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Supreme Court of the United States

October Term, 1989

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

against

GENERAL ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does ERISA preempt the states from requiring that public work contractors either provide prevailing fringe benefits or pay workers a cash amount equal to the cost of the benefits?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. The History And Operation Of Section 220	2
B. The G.E. Contract And The Department's Investigation	5
C. The Proceedings Below	7
REASONS FOR GRANTING THE WRIT	9
I. The Court Of Appeals Invalidated A Law Which Serves Significant State Governmental Policies Shared Equally By Many Other States	9
II. The Issue Presented Has Been Left Open By This Court's Prior Cases And Was Decided Erroneously By The Court of Appeals	12
CONCLUSION	20

APPENDICES

APPENDIX A—Opinion of the United States Court of Appeals for the Second Circuit .. 1a

APPENDIX B—Order of the U.S. Court of Appeals Entered January 10, 1990 Denying Petition for Rehearing 16a

APPENDIX C—Opinion of the United States District Court for the Southern District of New York 17a

APPENDIX D—Relevant Statutory Provisions 37a

TABLE OF AUTHORITIES

CASES	PAGE
Action Elec. Contr. Co. v. Goldin, 64 N.Y.2d 213 485 N.Y.S.2d 241, 474 N.E.2d 601 (1984)	4,5,15
Atkin v. Kansas, 191 U.S. 207 (1903).....	10
Austin v. City of New York, 258 N.Y. 113 (1932) .	11
Bucci v. Village of Port Chester, 22 N.Y.2d 195 (1968)	11
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987)	8,13, 15,17,19
General Electric Company v. New York State Department of Labor, 698 F.Supp. 1093 (S.D.N.Y. 1988), *Vac'd*, 891 F.2d 25 (2d Cir. 1989).....	1,2,7,8,9
Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986) ...	18
Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 831 (1978)	17,18
Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976)	10
Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), *petition for reh'g denied*, (Mar 16, 1990).....	12

PAGE

Local Union 598, Plumbers and Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co., 846 F.2d 1213 (9th Cir. 1988), *cert. denied*, __ U.S. __, 109 S.Ct. 210 (1988) 12

Mackey v. Lanier Collections Agency & Service Inc., __ U S. __, 108 S. Ct 2182 (1988) 16

Malone v. White Motor Corp., 435 U.S. 497 (1978) 13

Martori Bros. Distributors v. James-Massengale, 781 F.2d 1349 (9th Cir.), *cert. denied*, 497 U.S. 949 (1986) 13

Massachusetts v. Morash, __ U.S. __, 109 S. Ct. 1668 (1989) 12,13,14, 15,16,19

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 13

Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). 10

Rondout Elec., Inc. v. New York State Department of Labor, 84 Civ. 3095 (S.D.N.Y. 1984)... 8

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 14,17,18

Standard Oil of California v. Agsalud, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981) .. 17,18

White v. Mass. Council of Constr. Employers, 460 U.S. 204 (1983) 18

STATUTES, RULES AND REGULATIONS:

Davis-Bacon Act, 40 U.S.C.A. § 276a *et seq.* (West 1986) 10

	PAGE
Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1001 *et seq.* (West 1985)	passim
§ 3(1), 29 U.S.C.A. § 1002(1) (West 1989)	2,14
§ 514, 29 U.S.C.A. § 1144(a) (West 1985)	2,12
National Labor Relations Act, 29 U.S.C.A. § 151 *et seq.* (West 1973)	7
N.Y. Const. art. 1 § 17 (McKinney 1982)	3
N.Y. Labor Law	
§ 220 (McKinney 1986)	passim
§ 220(3) (McKinney 1986)	2,3
§ 220(5)(a) (McKinney 1986)	2,4
§ 220(5)(b) (McKinney 1989)	2,3
§ 220(5)(c) (McKinney 1986)	2,4
§ 220-b(2) (McKinney 1986)	7
Railway Labor Act, 45 U.S.C.A. § 151 *et seq.* (West 1986)	7
28 U.S.C.A. § 1254(1) (West 1989)	2
28 U.S.C.A. § 1331 (West 1976)	7
29 C.F.R. § 2510.3-1 (1987)	16
Miscellaneous:	
Governor's Ann. Message to the Legis., 1956 McKinney's Session Laws of N.Y. 1510	3
120 Cong. Rec. 29933 (1974)	13

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR, THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

— against —

GENERAL ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above action on November 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 891 F.2d 25 (2d Cir. 1989) and is reprinted in the appendix to the petition at 1a-15a.[1] The

[1]References to the appendix will be cited as "__a".

memorandum decision of the United States District Court for the Southern District (Carter, D.J.) is reported at 698 F. Supp. 1093 (S.D.N.Y. 1988) and is reprinted at 17a-36a.

JURISDICTION

On September 29, 1988, the District Court denied respondent's motion for a preliminary injunction against enforcement of N.Y. Labor Law § 220 (36a). The Court of Appeals on November 29, 1989 vacated the District Court's order and remanded the matter for further proceedings in light of that court's opinion (11a). On January 10, 1990, the Court of Appeals denied a timely petition for rehearing (16a). This petition is filed within 90 days of the denial of the petition for rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The applicable statutes are reproduced in the appendix at 37a-40a. The relevant federal statutory provisions are §§ 1002 and 1144(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The relevant New York State statutory provisions are N.Y. Labor Law §§ 220 (3) and (5) (a)-(c).

STATEMENT OF THE CASE

A. The History And Operation Of Section 220

The New York State prevailing wage law, N.Y. Labor Law § 220 *et seq.* (McKinney 1986), requires that laborers,

workers, and mechanics on public work projects be paid not less than the rate of wages and wage supplements which prevail in the same trade and locality of the project. N.Y. Labor Law § 220(3) (first and second undesig. paras.) (McKinney 1986) (38a). Wage supplements are defined in the law as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages'," including benefits such as health insurance, vacation and holiday pay. N.Y. Labor Law § 220(5)(b) (McKinney 1989) (40a).

The prevailing wage law was enacted in 1897. 1897 N.Y. Laws ch.415. In 1938, the requirement to pay prevailing wages on public work projects was made a part of the New York State Constitution. N.Y. Const. art. 1 § 17 (McKinney 1982). As originally enacted, the prevailing wage law did not require the payment of prevailing wage supplements. As fringe benefits became an increasingly important part of an employee's compensation, often offered by employers in lieu of additional wages, contractors who did not pay fringe benefits, or whose benefits did not meet area standards, enjoyed a competitive advantage in bidding on public work contracts. In order to address this problem, which was perceived as being unfair to union contractors who paid benefits, the Governor requested that the Labor Law be amended to include "'fringe benefits'—such as vacation pay, various forms of insurance, and pensions — as an element in the wage rate." Governor's Ann. Message to Legis., 1956 McKinney's Session Laws of N.Y. 1510, 1517. The statute was amended in 1956 to require public work contractors to provide the locally prevailing supplements. 1956 N.Y. Laws ch. 750. As noted by the New York State Court of Appeals, the amended statute "does not specify whether compliance is to be determined by consideration

of the employer's expenditures for benefits or by consideration of the qualitative nature of the actual benefits made available." *Action Elec. Contr. Co. v. Goldin*, 64 N.Y.2d 213, 221, 485 N.Y.S.2d 241, 474 N.E.2d 601 (1984). That court resolved the ambiguity when it struck down the New York City Comptroller's interpretation of the statute as requiring that contractors must provide the prevailing supplements by contributions to an in-kind benefits package equivalent to the prevailing supplements plan. *Id.* at 220. Since the legislative history of the supplements provision reflected "only a concern to equalize contractors' minimum labor costs," that purpose was met "when a contractor pays in cash, totally or partially, the cost of prevailing supplemental benefits." *Id.* at 222. The State Court of Appeals concluded "[T]his provision should not be interpreted to require that the employer maintain or contribute directly to a benefits plan equivalent in kind to the prevailing one in order to comply with the statute." *Id.*

The prevailing wage and wage supplement rates are determined annually by the fiscal officer.[2] N.Y. Labor Law § 220(5)(a) and (c) (39a-40a).[3] The wage supplement rates are based on the cost per worker of providing a particular benefit, not the value of that supplement to the worker. Under *Action Elec. Contr. Co. v. Goldin*, a contractor may

[2]The fiscal officer for all public work contracts, other than those on behalf of New York City, is the Commissioner of Labor of the State of New York ("Commissioner"). N.Y. Labor Law § 220(5)(e). For New York City contracts, the City Comptroller acts as the fiscal officer. *Id.*

[3]As applied to the time period covering this case, the prevailing wages and supplements are defined as those amounts paid under collective bargaining agreements covering 30 percent of the workers in the same trade in the locality where the work is to be performed. N.Y. Labor Law § 220(5)(a),(c) (39a-40a).

comply with the prevailing supplement requirement in one of three ways: by providing an equivalent benefit plan, by paying the workers the amount of the supplement in cash, or by providing a combination of benefits and cash equal to the prevailing supplement amount. 64 N.Y.2d at 221-22. Public work contractors who choose to provide one or more of the prevailing supplements through employee benefit plans are permitted to credit the cost of providing each such benefit toward their obligation to pay the corresponding prevailing supplement amount (JA 115a).[4] Contractors do not receive credit for benefits provided which are not prevailing benefits (JA 117a).

B. The G.E. Contract And The Department's Investigation

On or about January, 1987, respondent General Electric Company ("GE") was awarded a $3.6 million contract by the Long Island Railroad ("LIRR") for transformer maintenance and repair in Nassau, Suffolk, Queens and Kings Counties of New York (JA 113a). The contract was subject to N.Y. Labor Law § 220, and the contract specifications for the project included a schedule of the prevailing wages and wage supplements for each of the four counties, as determined by the Commissioner pursuant to Labor Law § 220(3).

GE is a party to a collective bargaining agreement with Local 3, International Brotherhood of Electrical Workers (IBEW), AFL-CIO. Collective bargaining agreements

[4] References to "(JA__)" are to the Joint Appendix filed in the Court of Appeals.

between GE and Local 3 have been in effect continuously during the LIRR project (JA 4a-6a). These agreements provide for wages and fringe benefits which are less than the amounts contained in the applicable prevailing wage schedules (JA 95a-96a, 117a, 127a).

In 1987, the New York State Department of Labor ("Department") commenced an investigation of the wages and wage supplements paid by GE to its employees performing work on the LIRR project (JA 116a). GE provided information to the Department as to wages and hours and a breakdown of the cost of its fringe benefits (JA 116a, 126a). The Department used that information to determine whether there were wage and supplement underpayments to workers on the LIRR project (JA 117a). To determine if there were wage underpayments, the Department compared the hourly wage paid by GE to the hourly wage rate for the appropriate job classification on the applicable prevailing wage schedule (JA 117a). To determine if there were wage supplement underpayments, the Department compared the GE benefits and their cost with the prevailing supplements and supplement amounts listed on the applicable prevailing wage schedule (JA 117a). Where GE provided a supplement listed on the applicable schedule, GE's cost for that benefit was credited toward the payment of the prevailing supplement amount (JA 117a).

On or about April 19, 1988, the Department completed its audit of the wages and supplements paid by GE on the LIRR project from its inception through the end of 1987, and informed GE of its preliminary finding that GE had underpaid an estimated $102,623.93 in wages and $59,494.65 in supplements (*i.e.*, supplement costs) (JA 81a-86a). The notice also informed GE that a hearing would be held to determine if it was liable for wage and

supplement underpayments, including interest and a penalty (JA 81a).[5]

C. The Proceedings Below

On July 22, 1988, GE commenced this action for a declaratory judgment and an injunction, invoking federal question jurisdiction under 28 U.S.C. § 1331, and sought a preliminary injunction against enforcement of Labor Law § 220 on GE's public work project for the LIRR (JA 1a-91a). GE alleged that enforcement of § 220 against it is preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), ERISA, and the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), and violates state law (JA 10a-13a).

The parties stipulated at a hearing before the district court that the issues for the court's determination were whether the prevailing wage law was preempted by either the NLRA or ERISA, and whether the law could be properly applied to the LIRR under either federal or state law (JA 138a). The parties agreed that these issues were purely legal issues requiring no fact-finding by the court.

On September 29, 1988, the district court denied GE's motion for a preliminary injunction. The court found "no merit" to GE's claims that the prevailing wage law was

[5]Pursuant to N.Y. Labor Law § 220-b(2), when wages or supplements appear to be due to workers on a public work project, the fiscal officer is required to notify the contracting agency (here, the LIRR) to withhold from any payment due the contractor sufficient money to satisfy the unpaid wages and supplements, including interest and any civil penalty that may be assessed, pending a final determination of the contractor's compliance with the prevailing wage law. Here, money was withheld by the LIRR from GE, although it was released upon GE's posting of a bond sufficient to cover the estimated underpayment, interest and penalty.

preempted by the NLRA, ERISA or other federal statutes (36a). As to GE's ERISA claim, the district court adopted the reasoning of the district court in *Rondout Elec., Inc. v. New York State Department of Labor,* 84 Civ. 3095 (S.D.N.Y. 1984) (Sand, D.J.):

> The statute does not require the maintenance of [ERISA] plans, regulate their terms or do anything other than consider the value to the employee of contributions to such plans as compared to the value of contributions made to similar plans by other employers in the industry and locality.

(33a-34a). In addition, the court concluded that the Eleventh Amendment to the United States Constitution barred it from considering GE's claim that state law precluded application of the prevailing wage law to the LIRR (35a).[6] On October 25, 1988, GE filed a notice of appeal (JA 181a).

On November 29, 1989, the Court of Appeals vacated and remanded (1a). The court held that § 220 is preempted by ERISA as applied to contractors such as GE because it requires them "either to bring their pension and welfare plans into conformity with those prevailing in the locality...or to make up the difference through cash payments to their employees." 891 F.2d 29 (10a-11a). It so held despite its recognition that the law permits a contractor to comply by making cash payments directly to its workers, thus requiring no modification of an employer's ERISA plans. As to the cash payment option, the majority cited *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987),

[6]GE did not pursue this claim on appeal or its claim of RLA preemption.

distinguishing it on the ground that here the cash payments are "continuous" payments over the course of the project, not single lump sum payments. 891 F.2d at 29 (9a).

The dissent, opining that "the majority overstates the impact of New York's prevailing wage law...", concluded that, since the law permits a contractor to comply by paying the cash equivalent of the benefit to the workers, N.Y. Labor Law § 220 does not interfere with any of the "primary administrative functions" of ERISA plans, has no necessary effect on an employee's eligibility for benefits or the amount of benefits received under a plan, and, thus, is not preempted by ERISA. *Id.* at 30 (13a). The dissent noted:

> [I]f it chooses, a contractor may provide a combination of cash and benefits, or simply benefits alone, but nothing in the law forces employers to take either of these options; indeed, considerations of efficiency would encourage most employers to provide the cash payments rather than alter their benefit plans. *Id.* (13a).

On December 13, 1989, petitioners filed a timely petition for rehearing. The Court of Appeals denied the petition on January 10, 1990 (16a).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Invalidated A Law Which Serves Significant State Governmental Policies Shared Equally By Many Other States

Prevailing wage laws, such as N.Y. Labor Law § 220, are important and longstanding exercises of state governmental authority. Thirty-two states, in addition to New York,

have laws requiring the payment of prevailing wages by public work contractors, and 24 of those require as well the payment of fringe benefits.[7]

These laws reflect important state governmental policies. This Court has recognized that a state exercises broad authority when it engages in a proprietary function. *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794 (1976). When a state contracts for public work construction, it performs a proprietary function. *White v. Mass. Council of Constr. Employers,* 460 U.S. 204 (1983). In that capacity, it has broad authority to prescribe minimum labor standards for the contractors with whom the state does business. *Id.; see also Atkin v. Kansas,* 191 U.S. 207 (1903). Thus, state prevailing wage laws, which mirror similar federal requirements embodied in such laws as the Davis-Bacon Act, 40 U S.C. A. § 276a *et seq.* (West 1986), are as integral to the performance of the states' proprietary functions as the federal requirements are to the federal government's duties. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

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[7]The following states require the payment of prevailing supplements by public work contractors: Alaska, Alaska Stat. § 36.95.010(7)(1982); California, Cal. Lab. Code § 1773.1 (West 1989); Connecticut, Conn. Gen. Stat. § 31-53 (1987); Hawaii, Haw. Rev. Stat. § 104-1(1985); Illinois, Ill. Ann. Stat. Ch. 48, para. 39S-2 (Smith-Hurd 1986); Kansas, Kan. Stat. Ann. § 44-201; Kentucky, Ky. Rev. Stat. Ann. § 337.505 (Baldwin 1983); Maryland, Md. State Fin. & Proc. Code Ann. § 17-208 (1988); Massachusetts, Mass. Gen. Laws Ann. ch. 149 § 27 (West 1982); Michigan, Mich. Comp. Laws § 408.552 (1985); Minnesota, Minn. Stat. Ann. 177.42 (West 1989); Missouri, Mo. Ann. Stat. § 290-210 (Vernon 1989); Montana, Mont. Code Ann. § 18-2-403 (1989); Nevada, Nev. Rev. Stat. § 338.010 (1989); New Mexico, N.M. Stat. Ann. § 13-4-11 (1989); Ohio, Ohio Rev. Code Ann. § 4115.03 (Page's 1980); Oklahoma, Okla. Stat. Ann. tit. 40, § 196.1 (West 1980); Oregon, Or. Rev. Stat. § 279.348 (1987); Pennsylvania, Pa. Stat. Ann. tit. 43 § 165-7 (Purdon 1964); Rhode Island, R.I. Gen. Laws § 37-13-6 (1984); Texas, Tex. Lab. Code Ann. § 5159a (Vernon 1987); Washington, Wash. Rev. Code Ann. § 39.12.010 (1972); Wisconsin, Wis. Stat. Ann. § 103.39 (West 1988); Wyoming, Wyo. Stat. § 27-4-405 (1977).

In addition, states have traditionally, in the exercise of their police powers, set minimum labor standards for contractors who perform public work on their behalf. The purpose of New York's prevailing wage law is to ensure that workers performing public work do not have to accept wages below the rate paid to workers on private work in the locality of the public project. The law "is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealing with laborers, workmen and mechanics." *Bucci v. Village of Port Chester*, 22 N.Y.2d 195, 201 (1968) (quoting *Austin v. City of New York*, 258 N.Y. 113, 117 (1932)).

The supplements provision of § 220 serves the purpose of equalizing competition for public work contracts. Its invalidation by the Court of Appeals threatens to reinstitute the inequality in bidding which the State legislature sought to end more than 30 years ago. Fringe benefits comprise a significant portion of total compensation. In 1988, they constituted approximately 30 percent of labor costs in the goods-producing sector. (1989) 79 Daily Labor Report (BNA) B-7. In this case, the prevailing supplements for the electrician job classification comprise almost 40 percent of the prevailing hourly wage of $22.15 (JA 123a). Thus, contractors who may ignore the supplement requirement would enjoy almost a $9.00 per hour per employee advantage in bidding over contractors whose benefits met prevailing standards. Such disparities could flow from the rule announced in this case by the Court of Appeals. That result would destroy the effectiveness of the entire statute. Given the large number of states whose laws also include the payment of fringe benefits, the issue involved in this case is one which has great significance beyond the immediate parties and, thus, deserves to be settled by the Court.

II. The Important Issue Presented, Which Has Been Left Open By This Court's Prior Cases, Was Decided Erroneously By The Court Of Appeals.

Despite the prevalence of prevailing wage laws, this Court has not yet addressed the viability of those laws under ERISA's preemption provision.[8] These laws were not the target of ERISA preemption. In enacting ERISA, Congress was concerned with the mismanagement of benefit funds accumulated to finance employee benefits and the failure to pay benefits from such funds. To address its concern, Congress established reporting, disclosure, and fiduciary requirements "to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator." *Massachusetts v. Morash*, ___ U.S. ___, 109 S. Ct. 1668, 1673 (1989).

As part of the statutory scheme, Congress adopted a preemption provision which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144(a) (1982). Senator Williams, a sponsor of ERISA, stated, in regard to the purpose of its preemption provision:

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[8] *Local Union 598, Plumbers and Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co.*, 846 F.2d 1213 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 210 (1988), involved Washington's prevailing wage law. That law, in contrast to New York's and many other states', including those of California, Ohio, Illinois, and Nevada, *see ante* at n.7, required that a public work contractor make contributions to a benefit plan. It was held to be preempted by ERISA on that basis.

In *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719 (9th Cir. 1989), *petition for reh'g denied* (Mar. 16, 1990), the court held that California's law governing the employment of apprentices on public work projects was preempted by ERISA. We have been advised that California will be filing a petition for a writ of certiorari in that case.

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans.

120 Cong. Rec. 29933 (1974). Recently, the Court reiterated the purpose of the preemption provision:

> It is thus clear that ERISA's preemption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

Fort Halifax Packing Co. v. Coyne, 482 U.S. at 12. Simply stated, ERISA preemption "ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations." *Id.* (citation omitted).

In analyzing preemption and its application to any state action, "the purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). It is a broad, but not all encompassing provision. *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 (9th Cir.), *cert. denied*, 497 U.S. 949 (1986). Thus, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or

peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 at 100, n.21 (1983). In addition, when a state acts in an area which states have traditionally regulated, "[a]bsent any indication that Congress intended such far-reaching consequences," the Court has stated its reluctance to interfere with "the separate spheres of governmental authority preserved in our federalist system." *Massachusetts v. Morash*, __ U.S. at __, 109 S. Ct. at 1675.

New York's prevailing wage law is an exercise of the State's traditional authority, involving both its proprietary authority and its police power. It is not the type of law with which Congress was concerned when it enacted ERISA's preemption provision. Moreover, since enforcement of N.Y. Labor Law § 220 does not create a risk of inconsistent or conflicting regulation of benefit plans and has only a peripheral effect on benefit plans, the Court of Appeals' preemption of the State's prevailing wage law is contrary to the decisions of this Court.

In *Massachusetts v. Morash*, __ U.S. __, 109 S. Ct. 1668, this Court addressed a state law that required an employer to pay a discharged employee any agreed-upon accrued vacation and holiday pay. The Court distinguished between allowable state regulation of wages and pre-empted state regulation of benefits. Although the definition in ERISA of an "employee benefit plan," 29 U.S.C. § 1002(1), could "surely be read to encompass any form of regular vacation payments to an employee," the Court held that Massachusetts was not preempted from requiring an employer to pay accrued vacation pay. *Massachusetts v. Morash*, __ U.S. at __, 109 S. Ct. at 1672. The Court reasoned that ordinary vacation payments are more like regular wages than benefits. Because Congress was only

concerned with regulating "benefits", which are financed out of accumulated funds and are contingent upon some future occurrence outside of the worker's control, laws which require the payment of accrued vacation benefits are not preempted. "If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed — a danger Congress chose not to regulate in ERISA." *Id.* at 1673.

The New York State prevailing wage law requires public work contractors to pay prevailing fringe benefits either by providing equivalent benefits to the workers or by paying the cost of those benefits to them directly as cash. *Action Elec. Contr. Co., Inc. v. Goldin,* 64 N.Y.2d 215, 485 N.Y.S.2d 241, 474 N.E.2d 601. The law does not, therefore, require an employer to contribute to a "plan". Nor, under the reasoning of *Morash,* do the required cash payments themselves constitute a benefit plan such that the State's enforcement of the obligation to pay them would be preempted.

The cash payments required by the prevailing wage law are functionally identical to vacation pay, holiday pay, premium pay or any other typical wage payment. While the amount of the required cash payment may be determined by reference to an ERISA benefit plan, that factor does not transform what is essentially ordinary compensation into a benefit. The payments remain fixed amounts paid directly to workers with their regular compensation from the contractor's general assets. *See Massachusetts v. Morash,* __ U.S. __, 109 S. Ct. 1668, 1675 (accrued vacation pay not a benefit even though its payment is deferred like severance pay benefits).

ERISA was enacted to safeguard employees from the abuse and mismanagement of benefit funds. *Fort Halifax Packing Co. v. Coyne,* 482 U.S. at 15-16. The precise

coverage of ERISA is not clearly set forth in the statute and thus conceivably could be read to encompass all types of employee compensation, as this Court has recognized. *Massachusetts v. Morash*, __ U.S. at __, 109 S. Ct. at 1672. However, given that Congress' primary concern was with the mismanagement of funds and the failure to pay employees benefits from such accumulated funds, regular cash payments to workers, like the accrued vacation pay at issue in *Morash*, which are "fixed, due at known times, and do not depend on contingencies outside the employee's control .... present none of the risks that ERISA was intended to address.[9] *Massachusetts v. Morash*, __ U.S. at __, 109 S. Ct. at 1673.

Furthermore, New York's requirement of cash payments does not subject a contractor to conflicting regulation of its ERISA plans since the employer need not tamper with its existing plans to make such payments. While an employer would need to calculate the cost of its own plans in order to obtain credit against the cost of the prevailing supplements, the law does not thereby interfere with the administrative functioning of a plan or create a substantial administrative burden or cost. *See Mackey v. Lanier Collections Agency & Service Inc.*, __ U.S. __, 108 S. Ct. 2182, 2186 (1988) (State garnishment law used by creditor to enforce judgment against a participant's benefits does not "relate to" ERISA plan despite burden on plan administrators). It has, for example, no impact on claim processing, benefit eligibility determination, or benefit disbursement. Any effect on a plan by the State prevailing wage

[9]The Court's conclusion in *Morash* was bolstered by a Secretary of Labor regulation which distinguishes between benefit plans covered by ERISA and types of regular compensation not covered, which included vacation benefits paid out of general assets. 29 C.F.R. § 2510.3-1(1987).

law, therefore, would be "too tenuous, remote or peripheral" to warrant its preemption. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100 n.21.

The Court of Appeals, while recognizing that a contractor could comply with the state's law without modifying its existing benefit plans, cited *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, to support its invalidation of the State's cash payment requirement because GE "is required to make continuous calculations, adjustments and payments." (9a).

In *Fort Halifax*, the Court upheld, against a claim of ERISA preemption, a Maine law which requires certain employers to pay severance pay upon a plant closing. The Court held that the requirement of a one-time lump sum severance payment to workers did not "relate to" an ERISA plan because the state law did not establish, or require the employer to maintain, a "plan", in the sense of an ongoing administrative scheme to process claims and disburse benefits. *Id.* at 12.

The Court's decision distinguished the Maine statute from those state laws that required that a "plan" be established or maintained, such as the Hawaii statute involved in *Standard Oil of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981) which required that employers provide employees with a comprehensive health care plan. See also *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 831 (1978) (California law regulating funding, disclosure, sales practices and quality of services provided by plans preempted by ERISA). In those cases, the state's requirement of a particular benefit plan would have destroyed the potential for administrative efficiency for multi-state plans which

ERISA was intended to achieve by subjecting the employer to differing state regulation. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 n.25 (1983) (State laws prohibiting discrimination in benefits and requiring employers to pay specific benefits "would make administration of a uniform nationwide plan more difficult."). Since the Maine law required only a single lump sum payment which did not necessitate an administrative program to accept, process, and determine claims, the state law did not "relate to" a plan and was not preempted.[10]

The Court of Appeals distinguished this case from *Fort Halifax* on the ground that the cash payments required by N.Y. Labor Law § 220 could not be made in one lump sum, but were "continuous". 891 F.2d at 29 (9a). *Fort Halifax*, however, did not answer the question presented here, whether cash payments required to equalize labor costs "relate to" a benefit plan within the meaning of ERISA. *Fort Halifax* addressed the separate issue of whether a state requirement to pay severance pay, which is indisputably a benefit covered by ERISA, created a "plan".[11] The

[10]The Court of Appeals cited both the *Standard Oil* and *Hewlett-Packard* cases in concluding that the State prevailing wage law affects "the rules and regulations under which the plan operates" and "the nature and amount of the benefits provided thereunder...." The state laws at issue in those cases, however, bear no resemblance to N.Y. Labor Law § 220 because they actually regulated benefit plans, setting funding, disclosure, and benefit requirements. By permitting a cash equivalent option for any prevailing supplement, N.Y. Labor Law § 220 does not prescribe the nature or amount of benefits provided by a plan. Nor does the law prescribe rules for a plan's operation since it does not require that records showing supplement costs be maintained in any particular form.

[11]In *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986), the Court of Appeals had held that the State could not enforce an employer's agreement to pay severance pay under various conditions to its workers. Thus, after *Gilbert*, it was unclear whether a state could require an employer to pay severance pay under ERISA.

requirement of a single lump-sum payment of severance pay in contrast to a continuing obligation to pay severance pay pursuant to individual claims did not necessitate the creation of an administrative scheme to accept, process, and determine claims. Thus, no "plan" was created by the law.

Fort Halifax is not, therefore, dispositive here. N.Y. Labor Law § 220 requires only that cash amounts be paid to the workers to equalize labor costs. These payments, continuing or not, do not create a benefit plan under ERISA. While the amount of the payments may be calculated by reference to a plan, they are deduced by simple arithmetic and do not involve the determination of individual claims, eligibility or benefit amounts. As shown in *Morash,* not every payment of compensation to workers constitutes a benefit plan under ERISA. Thus, the cash payments required by the State prevailing wage law which merely equalize labor costs do not create, or require an employer to maintain, a benefit plan. This Court should grant certiorari in order to resolve this issue.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
April 10, 1990

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APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 899—August Term, 1988

(Argued March 10, 1989 Decided November 29, 1989)

Docket No. 88-7922

GENERAL ELECTRIC COMPANY,

Plaintiff-Appellant,

—v.—

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS P. HARTNETT, Industrial Commissioner of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, CARDAMONE and PRATT,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Carter, J., denying a motion for preliminary injunction based on

alleged preemption of a State statute by ERISA. Order vacated and matter remanded for reconsideration.

JAMES S. FRANK, New York, New York (Virgil B. Day, Loraine M. Cortese-Costa, Marc S. Wenger, Vedder, Price, Kaufman, Kammholz & Day, New York, New York, of Counsel), *for Plaintiff-Appellant*.

JANE LAUER BARKER, Assistant Attorney General In Charge of Labor Bureau, New York, New York (Robert Abrams, Attorney General of the State of New York, O. Peter Sherwood, Solicitor General, Richard S. Corenthal and M. Patricia Smith, Assistant Attorneys General, New York, New York, of Counsel), *for Defendants-Appellees*.

Edward J. Groarke and Richard L. O'Hara, Mineola, New York (Colleran, O'Hara & Mills, Mineola, New York, of Counsel), *for Amicus Curiae, New York State, AFL-CIO and New York State Building and Construction Trades Council*.

VAN GRAAFEILAND, *Circuit Judge*:

General Electric Company appeals from an order of the United States District Court for the Southern District of New York (Carter, J.) denying its motion for preliminary injunctive relief against the enforcement of section 220 of New York's Labor Law. As a general rule, we do not disturb a district court's discretionary denial of a preliminary injunction, particularly where the plaintiff has not made a showing of irreparable harm or a balance of hardships tipping sharply in its favor. *See Pride v. Community School Board of Brooklyn*, 482 F.2d 257, 264 (2d Cir. 1973). However, in the instant case the parties agreed that only legal questions were involved and that no factual issues were presented. Accordingly, if we conclude that the district court's denial of plaintiff's motion for preliminary relief was based upon a misinterpretation of law that is basic to the issue of liability and may set a wrongful precedent, we have the power, and perhaps even the duty, to say so. *See Ring v. Spina*, 148 F.2d 647, 650 (2d Cir. 1945); *Nevill v. Shell Oil Co.*, 835 F.2d 209, 211 (9th Cir. 1987); 11 Wright & Miller, *Federal Practice and Procedure* § 2962 at 636-37 (1973). We hold that, as that portion of section 220 dealing with "supplements" is applied to employers in the position of appellant, it is preempted by section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.* Because the district court held to the contrary, we vacate the district court's order and remand for reconsideration of plaintiff's motion in the light of the proper legal principles.

As stated above, there is little or no dispute as to the facts. General Electric Company has a corporate "sub-

entity" known as the New York Service Center (hereafter "GE") whose principal place of business is in North Bergen, New Jersey. GE is a party to a collective bargaining agreement with Local 3 of the International Brotherhood of Electrical Workers. The contract provides for a number of nationally administered ERISA plans covering such things as pensions, disability, medical assistance and job and income security. The nature and scope of fringe benefits such as these are the result of collective bargaining and vary, of course, as between employers and also as between unions. However, insofar as the GE-Local 3 contract is concerned, the intent of the signatories, attested to by the undisputed sworn statement of GE's Manager of Employee Relations, was to have the incorporated supplemental benefits apply as equally as possible to all employees, regardless of the state or locality in which the employees might be working.

Since January 1987, a group of GE employees has been doing transformer maintenance and repair work for the Long Island Railroad in Kings, Queens, Nassau and Suffolk Counties pursuant to a public works contract. Section 220(3) of the New York Labor Law provides in substance that the wage rate on a public works contract shall be not less than the prevailing rate paid in the locality to the majority of workers in the same trade or occupation. Section 220(5)(a) defines prevailing wage rate as that which is paid in the locality by virtue of collective bargaining agreements between bona fide labor organizations and private employers who employ at least 30 percent of the workers in the same trade in the same locality.

Section 220(3) requires that "supplements" also be provided in accordance with local prevailing practices. Section 220(5)(b) defines "supplements" as "all remuner-

ation for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance." Section 220(5)(c) provides in substance that the prevailing practice for supplements shall be determined in the same manner as the prevailing wage rate is determined.

The district court found that the supplements provided by GE were "different from, and in some cases less than those which the state claims are due under Section 220." In each instance where the cost of a supplement provided for in the GE-Local 3 contract did not correspond with the cost of a similar prevailing local benefit, section 220 required GE either to bring the cost of its prescribed benefit into equivalence with the cost of the local prevailing one or to pay the additional cost directly to the employee-beneficiaries. *Action Electrical Contractors Co. v. Goldin*, 64 N.Y.2d 213, 218 (1984). GE was not permitted to substitute one form of supplement for another. In the words of the Appellate Division Fourth Department, "the statute indicates that the Legislature intended that the Commissioner of Labor, not the contractor, determine the supplements to be provided and that the employee receive either the listed benefits or equivalent cash (or a combination of both)." *A.L. Blades & Sons, Inc. v. Roberts*, 136 A.D.2d 926, 927 (mem.), *leave to appeal denied*, 72 N.Y.2d 803 (1988). As the district court found, "GE received no credit under the statute for its cost of providing benefits which were not deemed to be 'prevailing benefits' by the Commissioner." The Commissioner simply computed what he deemed to be GE's cost of providing supplements that would meet prevailing local practices and notified the

Railroad to withhold $241,117 in payments owed GE, which, according to the Commissioner, represented the cost of effecting compliance plus interest and penalties.

GE then moved in the district court for a preliminary injunction restraining the State from enforcing the notice, from prosecuting any proceeding against GE for the violations alleged in the notice and from enforcing any of the provisions of section 220 pending a prior hearing. GE's arguments in support of this motion, which it continues to urge in this Court, are that New York's attempt to regulate GE's payment of supplemental benefits has been preempted by both the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, and ERISA. GE also argues in this Court that the manner in which wage and supplement rates are established under section 220, *i.e.*, by reference to other privately negotiated labor agreements, constitutes an unconstitutional delegation of legislative power. However, the district court did not understand that it was being asked to pass on this question and did not do so. Although we have on occasion considered contentions not raised in the district court where they involved only questions of law, *e.g.*, *Foster v. United States*, 329 F.2d 717, 718 (2d Cir. 1964), we think it better that the unconstitutional delegation argument be directed to the district court in the first instance on the remand we now direct.

Insofar as the relationship between section 220 and the NLRA is concerned, we agree with the district court that the State statute has not been preempted by the federal. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987) ("[T]he NLRA is concerned with ensuring an equitable bargaining process, nor with the substantive terms that may emerge from such bargaining."); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985)

("Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA."); *cf. Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) (" 'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA'. . . . Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations.").

The issue of ERISA preemption is a different matter. Section 514(a) of ERISA provides in substance that the statute supersedes all State laws insofar as they "relate to" any employee benefit plan covered by the Act. In denying the existence of such relationship in the instant case, the district court adopted the reasoning of District Judge Sand in *Rondout Electric, Inc. v. New York State Dep't of Labor*, 84 Civ. 3095 (S.D.N.Y. 1984), to the effect that section 220 does not "do anything other than consider the value to the employee of contributions to [ERISA] as compared to the value of contributions made to similar plans by other employers in the industry and locality." This is not a correct statement of what section 220 does. The section originally was designed to insure that employees on public works were paid wages equivalent to the prevailing rate of similarly employed workers in the locality. *Smith v. Joseph*, 275 A.D. 201, 203, *aff'd*, 300 N.Y. 516 (1949). Because the statute made no reference to fringe benefits, bidders on public works contracts who provided no such benefits were in a position to underbid those who did. Accordingly, section 220 was amended in 1956 to require that all bidders on public works contracts assume the cost of prevailing fringe benefits in the locality, thus presum-

ably putting all bidders on an even footing.[1] *Action Electrical Contractors Co. v. Goldin, supra*, 64 N.Y.2d at 221-22. Section 220 measures supplements by their cost to the employer, not their "value to the employee." The employer may satisfy his statutory obligation by giving his employees the cash cost rather than the benefit:

> Under subdivision 3 of section 220 of the Labor Law, supplemental fringe benefits must be provided to such employees "in accordance with the prevailing practices in the same trade or occupation in the locality within the state" where the public work is located. This requirement will be fulfilled when employees are supplied with the cash equivalent of the cost of obtaining the prevailing benefits or by providing an equivalent benefits plan, or by a combination of benefits and cash equal to the cost of the prevailing benefits.

Action Electrical Contractors Co. v. Goldin, supra, 64 N.Y.2d at 218.

The Supreme Court holds that under ERISA, "private parties, not the Government, control the level of benefits." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). The New York courts hold that under section 220, "the Commissioner of Labor, not the contractor, determine[s] the supplements to be provided." *A.L. Blades & Sons, Inc. v. Roberts, supra*, 136 A.D.2d at 927. These courts are adjudicating in the same area but reach-

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1 Because section 220 requires ex-locality employers to incur the cost of all locally prevailing supplements, while at the same time the statute denies them credit for non-prevailing pension and welfare benefits they are required by their collective bargaining agreements to provide, ex-locality employers in a situation such as this may be placed at a financial disadvantage in bidding.

ing inconsistent results, and that is exactly what ERISA was designed to prevent. *See* statements of Senator Williams and Congressman Dent quoted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983).

As stated above, the GE-Local 3 bargaining agreement was designed to be applied uniformly to all employees in the bargaining unit regardless of their working location. This is what Congress hoped to accomplish when it enacted ERISA. *Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co.*, 846 F.2d 1213, 1220 (9th Cir.), *aff'd sum.*, 109 S. Ct. 210 (1988); *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), *aff'd sum.*, 477 U.S. 901 (1986). At the present time, there is not even unity as between Nassau/Suffolk Counties on the one hand and Kings/Queens Counties on the other. Moreover, GE cannot eliminate the differences by single cash payments, as in *Fort Halifax Packing Co. v. Coyne*, *supra*, 482 U.S. at 12; *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1358 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986); it is required to make continuous calculations, adjustments and payments.

Section 514(a) of ERISA was intended to have a "sweeping preemptive effect in the employee benefit plan field." *American Progressive Life and Health Ins. Co. v. Corcoran*, 715 F.2d 784, 786 (2d Cir. 1983). Congress intended ERISA to occupy and regulate the field of employee benefit plans. *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287, 1303 (2d Cir. 1981), *modified on other grounds sub nom. Shaw v. Delta Air Lines*, *supra*, 463 U.S. 85; *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). It

sought to "preempt all state laws that *relate* to employee benefit plans and not just state laws which purport to regulate an area expressly covered by ERISA." *Wadsworth v. Whaland*, 562 F.2d 70, 77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *see Pervel Indus., Inc. v. State of Connecticut Comm'n on Human Rights and Opportunities*, 468 F. Supp. 490 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1351 (8th Cir. 1980).

A state law "relates to" employee benefit plans when it has "connection with or reference to" such plans, *Gilbert v. Burlington Indus., Inc.*, *supra*, 765 F.2d at 327 (quoting *Shaw v. Delta Air Lines*, *supra*, 463 U.S. at 97), "whenever it 'purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans.' 29 U.S.C. § 1144(c)(2) (1976)." *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd sum. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983). Such connection exists where a state statute prescribes either the type and amount of an employer's contributions to a plan, *Local Union 598 v. J.A. Jones Constr. Co.*, *supra*, 846 F.2d at 1219; *Stone & Webster Engineering Corp.*, *supra*, 690 F.2d at 329; the rules and regulations under which the plan operates, *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 831 (1978); or the nature and amount of the benefits provided thereunder, *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 706-07 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd sum.*, 454 U.S. 801 (1981). Section 220 intrudes into all three of these preempted areas. Ex-locality employers such as GE are required either to bring their pension and welfare plans

into conformity with those prevailing in the locality (as the prevailing plans are determined to exist by a State fiscal officer on the basis of job classifications made by the Department of Labor) or to make up the difference through cash payments to their employees. The employer is required to keep, and on request to file with the State, sworn schedules of supplements and wages and to make its books and records pertaining to wages, supplements and hours of labor available for inspection by a State fiscal officer. In the event the employer fails to bring a plan into conformity with a similar plan prevailing in the locality, the employee may be required to accept cash payments based on what the employer's cost would have been to accomplish conformity, *Action Electrical Contractors Co. v. Goldin*, *supra*, 64 N.Y.2d at 218, 222, payments that may be of lesser value to the employee than the unpaid benefits would have been. In sum, we conclude that the above-described provisions of section 220 clearly relate to the ERISA plans of ex-locality employers and are pre-empted by the federal statute.

We therefore vacate the district court's order denying GE's motion for a preliminary injunction and remand the matter to the district court for reconsideration of GE's motion in the light of the law as we have defined it herein. At the same time the district court may consider GE's due process argument based on the procedure followed in determining what constitutes prevailing supplements.

PRATT, *Circuit Judge*, dissenting:

Federal preemption under ERISA does not sweep so broadly that it invalidates a state law governing labor costs that neither purports to regulate employee benefits plans nor affects, directly or indirectly, a plan's primary administrative functions. Because the majority both overstates the impact of New York's prevailing wage law and breaks stride with our prior decisions in this area, I respectfully dissent from the majority's opinion insofar as it holds that § 220 is preempted by ERISA.

In our latest and perhaps most thorough discussion of ERISA preemption, we compared the types of laws that have been struck down under § 514 with those that have withstood preemption challenge. *See Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 145-47 (2d Cir.), *cert. denied*, 110 S. Ct. 57 (1989). We found the types of statutes that have been held preempted were "those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee." The types of statutes that have survived preemption analysis were typically laws of general application, "often traditional exercises of state power or regulatory authority", whose economic and administrative effects on benefits plans were incidental to their primary objectives. *Id.* at 146. Generalizing from these cases, we concluded that "[w]hat triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefits plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." *Id.* at 146-47.

New York's prevailing wage law does none of these things. It does not interfere with any of the primary administrative functions of ERISA plans; it does not affect the structure or administration of benefits plans; it does not determine an employee's eligibility for benefits; nor does it control the type or level of benefits provided. Rather, the law seeks to equalize the minimum labor costs for employers bidding on public works contracts. It accomplishes this goal, in part, by requiring contractors to give their employees the cash equivalent of what it would cost them to provide the wage "supplements" (that is all fringe benefits, regardless of whether they are covered by ERISA) prevailing in the locality where the work is to be performed. *Action Elec. Contractors Co. v. Goldin*, 64 N.Y.2d 213, 474 N.E.2d 601, 485 N.Y.S.2d 241 (1984). If it chooses, a contractor may instead provide a combination of cash and benefits, or simply benefits alone, but nothing in the law forces employers to take either of these options; indeed, considerations of efficiency would encourage most employers to provide the cash payments rather than alter their benefits plans.

Regulation of labor costs in public works projects is surely a valid exercise of the state's traditional regulatory authority. As we have previously emphasized, where a law claimed to be superseded by ERISA "is an exercise of a State's police powers," the law should not be held preempted "unless this conclusion is unavoidable." *Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985). While preemption may be an unavoidable conclusion where a state law explicitly singles out ERISA plans for different treatment, *see Mackey v. Lanier Collections Agency*, 486 U.S. 825 (1988), or directly alters the calculation or payment of benefits under ERISA-covered pension plans, *see Alessi v. Raybestos-*

Manhattan, Inc., 451 U.S. 504 (1981); *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983), or creates a cause of action to enforce a right granted by ERISA, *see Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 477 U.S. 901 (1986), no such problem is presented by the statute before us. The fact that employers may choose to comply with the law by providing a different benefits plan or a combination of benefits and cash rather than by simply paying the additional costs as wages, does not render the statute preempted. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983) (while a state may not require employers to alter their ERISA plans, it is not preempted from giving them that option as a means of complying with state law).

The incidental administrative burdens this law places on benefits plans are comparable to, and certainly no worse than, the burdens involved in *Rebaldo* and *Aetna Life*. The state statute in *Rebaldo* prescribed what hospitals could charge for in-patient care, thus precluding ERISA plans from negotiating their own discount rates with hospitals and forcing the plans to operate differently and more expensively in that state. In *Aetna Life*, compliance with a state escheat law required ERISA plans to undertake record-keeping and other administrative duties different from its responsibilities in other states. In both cases, compliance with the state law had both an administrative and an economic impact on ERISA plans, but in neither case did we conclude that such effects required preemption.

Similarly, New York's prevailing wage law requires an employer to satisfy certain administrative responsibilities, such as making its books and records available for inspec-

tion. As in *Rebaldo* and *Aetna Life*, these requirements may make an employer's benefits plan somewhat more expensive to operate. Yet these requirements are merely incidental to the law's primary goal of equalizing the labor costs of local and ex-locality contractors, and they impose no greater expense or burden than the laws upheld in *Rebaldo* and *Aetna Life*. Indeed, we expressly noted in *Rebaldo* that the very type of law at issue here—a state law governing labor costs—was not the sort of statute that congress intended to preempt, despite its impact on the cost and administration of pension plans. 749 F.2d at 138 (ERISA does not preempt "State labor laws that govern working conditions and labor costs" even though compliance with such laws may increase the cost of operating benefits plans); *accord Aetna Life*, 869 F.2d at 145.

The majority does not attempt to distinguish *Rebaldo* or *Aetna Life*, nor, in my view, could it sensibly do so. Like the statutes we upheld in those decisions, New York's prevailing wage statute is a law of general application whose tangential effects on employee benefits plans are negligible and wholly incidental to the law's primary purpose. Since the majority opinion departs from the wise path charted by our prior decisions, I dissent. New York's prevailing wage law is not preempted by ERISA, and the order of the district court should be affirmed.

APPENDIX B

Order of the U.S. Court of Appeals Entered January 10, 1990 Denying Petition for Rehearing

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January, one thousand nine hundred and nineteen-ninety.

DOCKET NUMBER 88-7922

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellant,

— v. —

NEW YORK STATE DEPARTMENT OF LABOR: THOMAS P. HARTNETT, INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK; CHARLES DROBNER, DIRECTOR OF PUBLIC WORK, NEW YORK STATE DEPARTMENT OF LABOR; ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellees NEW YORK STATE DEPARTMENT OF LABOR, et. al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK 88 Civ. 5154 (RLC)

GENERAL ELECTRIC COMPANY,

Plaintiff,

— against —

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS P. HARTNETT, Industrial Commissioner of the State of New York; CHARLES DROBNER, Director of Public Work, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Defendants.

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CARTER, District Judge

Plaintiff General Electric Company ("GE") entered a contract with the Long Island Railroad ("LIRR") to service electric transformers owned by the railroad and located on Long Island. New York State has sought to enforce its so-called prevailing wage law against GE in connection with this contract, and GE has responded by seeking declaratory and injunctive relief against the state. At a hearing held July 26, 1988, the parties stipulated to a continuation of the status quo pending the court's expedited decision on GE's motion for a preliminary injunction. It was agreed that the sole issues for court determination were (1) whether New York's prevailing wage law, N.Y. Lab. Law § 220 (McKinney 1986), is pre-empted by either the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, or the Employee

Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and (2) whether Section 220 may properly be applied to the LIRR in any case. The parties agreed that these were purely legal questions and that no factual presentation was required. The issues were fully discussed in the briefs filed. We now proceed to determination.

Background

Section 220 of New York's Labor Law ("Section 220") requires contracts for the performance of public work to contain provisions which (1) limit the working day of laborers employed under the contract and (2) require them to be paid wages and benefits which at least equal prevailing wages and benefits paid to laborers employed in the same trade or occupation in that locality. N.Y. Lab. Law § 220(2)-(3).

If at least thirty percent of the laborers employed in a particular trade are covered by collective bargaining agreements in a particular locality, then the prevailing wages and benefits which public works contractors are required to pay are determined by reference to those agreements. Otherwise, the prevailing wage under the statute is the "average wage" paid in the trade in that locality. *Id.* § 220(5)(a).

In January, 1987, GE entered a contract with the LIRR to service and repair electric transformers located in Kings, Queens, Nassau, and Suffolk counties. The contract specifications included a schedule of prevailing wages and benefits based on two collective bargaining agreements concluded by locals of the International Brotherhood of Electrical Workers ("IBEW"), one covering laborers

employed in Queens and Kings Counties, and one covering laborers employed in Nassau and Suffolk Counties.

Performance of the contract was undertaken by General Electric Apparatus and Engineering Services — New York Service Center, a sub-entity of GE. The Service Center's principal place of business is in North Bergen, New Jersey, but the work at issue in this case was performed in New York State. The Service Center's employees are represented by Local 3, IBEW, and collective bargaining agreements between Local 3 and GE have been in force during the entire period at issue. These agreements provide for the payment of wages and benefits which are different from, and in some cases less than those which the state claims are due under Section 220.

In conformity with a decision issued by the New York Court of Appeals, *Action Electric Contractors Co., Inc. v. Goldin*, 64 N.Y.2d 213, 485 N.Y.S.2d 241, 474 N.E.2d 601 (1984), the state interprets Section 220 as allowing employers to provide required benefits in the form of cash payments equal to the employer cost of the required benefits in lieu of providing the benefits themselves. However, the department does not allow the cost of benefits that do not qualify as "prevailing benefits" to be counted as an offset towards an employer's obligation to provide required benefits or their cash equivalent. Thus, GE received no credit under the statute for its cost of providing benefits which were not deemed to be "prevailing benefits" by the Commissioner.

The record before the court does not permit any conclusion to be drawn as to the identity or nature of the benefits for which GE has been denied credit. While GE has suggested that these exclusions add to the illegality of the state's actions in this case, no specific claim has been

made that they are improper, and this decision does not consider that issue.[1]

Determination

A. NLRA Pre-emption

The NLRA pre-empts state law in two situations.[2] The first is "when it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8."[3] *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3L.Ed.2d 775 (1959). As the Court explained, "[t]o leave the states free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* More recently,

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[1]It may also be the case, though the submitted documents are unclear on this question, that the state does not allow excess costs incurred by an employer in providing a particular benefit to be counted as an offset towards the employer's obligation to provide another benefit which is under-funded according to the prevailing benefit standard. In other words, it may be the case that the state treats each prevailing benefit as a separate obligation which is either satisfied or not, based on whether the cost incurred by the employer in providing that particular benefit (or in the form of a cash payment offered in lieu of the benefit) equals or exceeds the prevailing standard for that benefit. *See* Bleiberg aff., ¶ 11, and Exhibits C, D; Whittaker aff., ¶ 26; Plaintiff's Complaint, Exhibit B. This decision passes no judgement on the propriety of exclusions of this type either. Indeed, by agreeing to have the court issue its decision upon submissions, the parties agreed at least sub silentio that these issues were not before the court.

[2]See *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 748-51, 105 S.Ct. 2380, 2993-95, 85 L.Ed.2d 728.

[3]Section 7 of the NLRA (codified as 29 U.S.C. § 157) protects the right of employees to engage in concerted activity or to refrain from such activity. Section 8 of the act (codified as 29 U.S.C. § 158) declares certain practices by employers and employees to be prohibited unfair labor practices.

the Court explained the purpose of the *Garmon* rule as the protection of "the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA." *Metropolitan Life Ins. Co. v. Mass.* 471 U.S. 724, 748, 105 S.Ct. 2380, 2393, 85 L.Ed.2d 728 (1985).

The second type of federal pre-emption occurs when a state attempts to regulate an activity which Congress intended to be left unregulated, even though the activity is arguably neither protected by Section 7 nor prohibited by Section 8 of the NLRA. The rationale for this type of pre-emption is to avoid upsetting "the balance of power between labor and management expressed in our national labor policy." *Teamsters v. Morton,* 377 U.S. 252, 260, 84 S.Ct. 1253, 1258, 12L.Ed.2d 280 (1964).[4]

This second type of pre-emption is illustrated by the holding in *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976). In *Machinists,* the Court held that a state could not enjoin a concerted refusal to work overtime on the basis of state law, even though the Regional Director of the National Labor Relations Board had determined that the activity "was not conduct cognizable by the Board." *Id.* at 135, 96 S.Ct. at 2550. The Court reasoned that Congress intended to leave such weapons of economic self-help unregulated.

[4]In *Morton* the Court held that damages could not be awarded to an employer on the basis of a state law claim concerning peaceful secondary boycott activity undertaken by a group of employees, even though the activity was arguably neither protected nor prohibited by the NLRA. The Court reasoned that by expressly allowing the federal courts to award damages to persons injured by certain kinds of secondary boycott activity, Congress intended to leave other kinds of secondary boycott activity unregulated in order "to leave this weapon of self-help available" to participants in a labor dispute. *Morton,* 377 U.S. at 258-60, 84 S.Ct. at 1257-59.

GE contends that Section 220 is pre-empted under both *Garmon* and *Machinists*. I disagree. *Garmon* is inapplicable since the contested state action here does not attempt to regulate an activity which is either protected or prohibited under the NLRA. Sections 7 and 8 of the NLRA are not concerned with the substantive outcome of the collective bargaining process, and efforts by states to limit the outcome of that process do not impinge on the jurisdiction of the NLRB to determine what employer and employee conduct the NLRA prohibits or permits.[5]

The inapplicability of the *Garmon* rule is illustrated by *Local 24 of the International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 79 S.Ct. 297, 3L.Ed.2d 312 (1959), a case on which GE places considerable reliance. In *Oliver*, the Court held that a state anti-trust law was pre-empted by the NLRA. The statute at issue had been applied to invalidate provisions of a collective bargaining agreement regulating rental and other terms of leases under which truck drivers leased and operated their vehicles for lessee common carriers. Finding that the purpose and effect of the contract provisions were to fix wages and not prices, the Court held that the statute impermissibly interfered with the right and duty of the carriers and their employees to engage in collective bargaining regarding wages, hours, and other terms and conditions of employment.

To be sure, the opinion contains language indicating that the state anti-trust statute may not be applied "to prevent the contracting parties from carrying out their

[5]"The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metropolitan Life*, 471 U.S. at 753, 84 S.Ct. at 1257-59.

agreement upon a subject matter as to which federal law directs them to bargain," *id.* at 295, 79 S.Ct. at 304, but the issue before the Court was not whether the state could impose substantive limits on the outcome of collective bargaining, but whether the state could use an anti-trust statute to prohibit employers and employees from engaging in collective bargaining. The Court found that the effect of the statute at issue in *Oliver* was to prevent collective bargaining over wages. Section 220, however, does not prevent GE from exercising its right and duty to engage in collective bargaining regarding wages and benefits. It merely imposes a floor on the wages GE can bargain for. The issue of whether states may impose such substantive limits on the outcome of collective bargaining was not addressed in *Oliver*.

In an effort to support its claim of federal pre-emption under *Garmon* principles, GE characterizes the state's action in enforcing Section 220 as an effort "to mandate a violation of NLRA 8(a)(5) by requiring GE to unilaterally alter the terms and conditions of employment established under its agreement." Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction, p. 12. GE argues that it is being required "to 'replace' the wages and benefits contained in its [collective bargaining] Agreement with those in other collective bargaining agreements." Plaintiff's Memorandum of Law in Reply to Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, p. 4 [hereinafter "Plain. Reply Mem."].

If Section 220 actually did require GE to "replace" its collective bargaining agreement with another, then the *Garmon* rule would be implicated, but Section 220 does not

do that.[6] The only obligation imposed on GE is to comply with the minimum standards which the state has imposed.[7] Thus, rather than involving Sections 7 or 8 of the NLRA, the gravamen of GE's claim is that the state's establishment of these minimum standards regulates a matter which Congress intended to be left unregulated. Such a claim raises issues which has been addressed not in the *Garmon* line of cases, but in the line of cases articulating the principles of *Machinists* pre-emption.

The particular decision in the *Machinists* line of cases which is dispositive on the propriety of such standards is *Metropolitan Life.* In that case, a unanimous Court upheld a state statute that required certain minimum health care benefits to be included in employee health care plans covering hospital and surgical expenses. The appellants in that case made the same argument that GE has made,

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[6]GE also contends that reliance on collective bargaining agreements to determine prevailing wage and benefit standards brings Section 220 within the scope of the holding in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 212, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206 (1985). This claim is without merit. In *Lueck* the Court held that "state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement, are pre-empted by those agreements." *Id.* at 213, 105 S.Ct. at 1912. The right of workers employed on public works in New York State to be paid prevailing wages is derived from Section 220. It cannot be said to originate in the collective bargaining agreements which the state uses to determine prevailing rates, since the right would exist even if there were no collective bargaining agreements in effect in the state.

[7]To be sure, the State relies on collective bargaining agreements to determine prevailing wages and benefits (when at least thirty percent of the laborers employed in a particular trade are covered by such agreements), but public works contractors do not have to enter a collective bargaining agreement to engage in public work, nor do they have to replace any collective bargaining agreements they may have with their employees. They remain free, whether under the terms of a collective bargaining agreement or spontaneously, to pay more than the State's minimum standards require.

namely, that in enacting the NLRA Congress "intended to prevent the states from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining positions, and would otherwise have been permitted to set at a lower level than that mandated by state law." *Metropolitan Life*, 471 U.S. at 751, 105 S.Ct. at 2395. The Court rejected this argument.

> "[T]here is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization.... Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act. *Id.* at 756, 105 S.Ct. at 2397.

To overcome this holding GE argues that a *prevailing* wage statute like Section 220 does not establish *minimum* labor standards, because:

> "a prevailing wage is in the nature of an average wage (and contractors in the locality and throughout the state will pay above and below the rate) which varies from year to year and in accordance with the economic climate which dictates the outcome of industry/union negotiations; employees of the state and its municipalities who perform public work do not receive the wage; prevailing wage requirements are not generally applicable to private persons and corporations, except when such persons contract with the state; and, the prevailing wage is not set by statute

> state; and, the prevailing wage is not set by statute but is derived from private agreements throughout the state." Plain. Reply Mem. at 9-11 (footnote omitted).

This argument is unpersuasive. The state's standards are indeed based on prevailing rather than minimum wages paid in the private sector, but once the standards have been determined by the Commissioner, they have a legal effect on covered employers and employees exactly like other minimum wage statutes. Nor does the fact that these standards are determined by an administrative process alter their character as obligations imposed by statute. It also does not matter that the coverage of the statute is limited and that it requires the payment of wages above those which uncovered employees may be paid. The coverage of minimum wage statutes is rarely universal,[8] and the state has a rational reason for applying this statute to the employees of private contractors engaged in performing public work and for setting its minimum standards at the level it has selected.[9]

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[8]When initially enacted, the federal minimum wage covered only about 43 percent of all nonsupervisory wage and salary workers, mainly those employed in larger firms involved in extensive interstate commerce. *See* R. Ehrenberg & R. Smith *Modern Labor Economics* 77-79 (3d ed. 1988). Even today, the federal minimum wage covers less than 90 percent of all nonsupervisory wage and salary workers. *See* Smith and Vavrichek, *The Minimum Wage: Its Relation to Incomes and Poverty*, 110 Monthly Lab. Rev. 24 (June 1987).

[9]The New York Constitution requires laborers, workmen and mechanics employed by a contractor performing public work to be paid prevailing wages and work no more than eight hours a day and five days a week. N.Y. Const. art. 1, § 17. Section 220 gives effect to this constitutional provision. New York courts have interpreted the statute as intending "to insure that workmen on public projects will receive an adequate wage," and as affording "protection to a contractor by giving him some foreknowledge of potential labor costs when bidding on such

(footnote continued on next page)

The cases which GE cites in support of its position are all distinguishable. In *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986), the city conditioned a franchise renewal on the settlement of an ongoing labor dispute, thus impermissibly intruding itself into the collective-bargaining process. As the Court noted, "[e]ven though agreement is sometimes impossible [in free collective bargaining], government may not step in and become a party to the negotiations." *Id.* 106 S.Ct. at 1401. No similar circumstance exists in the instant case.

In *Hydrostorage, Inc. v. Northern California Boilermakers*, 685 F. Supp. 718 (N.D. Cal. 1988), the NLRA was held to pre-empt a statute requiring contractors engaged in public works to participate in a mandated apprenticeship training program, because it would require the plaintiff "to become a party to certain provisions of the Boilermakers collective bargaining agreement." *Id.* at 725. Citing *Golden State*, the court reasoned that "a state cannot penalize an employer for not becoming a party to a collective bargaining agreement, in whole or in part, which it did not voluntarily negotiate." *Id.* Under Section 220, GE would be required to pay certain minimum wages and supplements, not enter a collective bargaining agreement.

In *Bechtel Construction v. United Brotherhood of Carpenters*, 812 F.2d 1220 (9th Cir. 1987), the court held that an across-the-board wage reduction negotiated in a collective

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projects." *Brang Co. v. State U. Const. Fund*, 47 A.D.2d 178, 365 N.Y.S.2d, 914, 916 (3d Dept. 1975). The purpose of the amendments to the statute which brought wage supplements within its purview has been described as "a concern to equalize contractors' minimum labor costs," so that employers who do not provide fringe benefits to their employees would not have a competitive advantage in bidding on public works contracts. *Action Electric Contractors. Co. v. Goldin*, 64 N.Y.2d 213, 222, 485 N.Y.S.2d 241, 245, 474 N.E.2d 601 (1984).

bargaining agreement did not have to give way to a higher wage schedule contained in an "Agreement to Train Pipe Trades Apprentices" which the plaintiff construction company had entered with an industry apprentice training program operated jointly by labor and management representatives. The "Apprenticeship Agreement" included a wage rate schedule approved by the California Division of Apprenticeship Standards in conformity with state law. The holding was principally based on the court's finding that "California law cannot reasonably be interpreted to place its apprenticeship wage standards above the collective bargaining process," *id.* at 1222, but the court went on to "consider only briefly whether federal labor law forbids what is forbidden by California law." *Id.* at 1225.

With respect to this latter issue, the *Bechtel* court concluded that "[t]he negotiation of wage rates ... is protected activity under section 7" of the NLRA, and that section 7 "would therefore preempt any attempt to enforce the Approved Standards against collectively bargained-for wage rates." *Id.* Recognizing that "*Metropolitan Life* seems at first glance to contradict [this] conclusion," the court cited two factors which distinguished *Bechtel* from that case.

First, the court reasoned that the standards at issue in *Bechtel* were not like the minimum labor standards protected in *Metropolitan Life*, because they could be "undercut" with the approval of the state agency charged with enforcing the standards,[10] and "[a] 'minimum' by definition

[10] In support of its interpretation of state law, the appellant union and apprenticeship training program had relied on an "Information Bulletin" issued by the state Division of Apprenticeship Training which indicated that when a lower rate of pay is negotiated for apprentices in a collective bargaining agreement, the wages specified in the agency's "Approved Standards" had to be paid until a wage revision was submitted and approved by the Division of Apprenticeship Training.

cannot be undercut." *Id.* at 1225-26. Secondly, the court reasoned that "the Court in *Metropolitan Life* failed to consider that such standards can sometimes have a serious effect on the collective bargaining process," because the higher wages which the state sought to enforce for apprentices would upset the wage scale for which higher-level tradespeople had bargained.

There is no real support for GE's position in this holding. Unlike the California standards at issue in *Bechtel*, the wage and hours standards established under the authority of Section 220 cannot be "undercut" with the consent of the state agency charged with enforcing them, and the standards apply to all tradespeople, not just to one grade of labor."

The Supreme Court did not define the scope of the "minimum labor standards" category in *Metropolitan Life*,

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"Furthermore, the *Bechtel* court's reading of the holding in *Metropolitan Life* can be criticized as excessively narrow. First, the *Bechtel* court's holding that "a 'minimum' by definition cannot be undercut" is hard to reconcile with *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987), in which minimum severance payment standards were held to be minimum labor standards even though they could be undercut by private severance payment agreements between employers and their employees. *Id.* 107 S.Ct. at 2213, n. 1, 2222-23, 96 L.Ed.2d 1. Clearly, minimum labor standards do not have to be impregnable to undercutting to avoid pre-emption. Secondly, the *Bechtel* court's holding that the California wage standards were pre-empted because they did not affect all workers equally (and therefore disrupted wage scales for which higher-level tradespeople had bargained) is hard to reconcile with the protection afforded by *Metropolitan Life* to state minimum wage statutes. *Metropolitan Life*, 471 U.S. at 755, 105 S.Ct. at 2397. Minimum wage statutes have the very same effect which concerned the *Bechtel* court. In practice, they too apply only to the lowest grade of labor employed in an enterprise and can therefore disrupt wage scales for which higher-level tradespeople have bargained. Thus, it is hard to understand how this consideration supports a holding that the California statute at issue in *Bechtel* is pre-empted.

but there is no reason to give the term a restricted interpretation. As the Court commented in *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 2222, 96 L.Ed.2d 1 (1987), "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." Certainly, no blanket prohibition of state regulations having a substantive impact on the collective bargaining process can properly be read into the NLRA. It is always necessary to determine whether Congress intended to permit the type of state regulation at issue.

For example, in *Malone v. White Motor Corp.*, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978), the Court looked to the federal statute which regulated the disclosure of information by private pension plans prior to ERISA to determine whether Congress intended the NLRA to pre-empt state authority to regulate pension plans.[12]

The same analytical approach was used by the Court in *New York Telephone Co. v. New York Labor Dept.*, 440 U.S. 519, 99 S.Ct. 1328, 59 L.Ed.2d 553 (1979). The Court acknowledged that New York's practice of permitting strikers to collect unemployment compensation benefits "altered the economic balance between labor and management," and that this arguably brought the case within the purview of the *Machinists* rule for NLRA pre-emption. *Id.* at 531-32, 99 S.Ct. at 1336-37. Nevertheless, as in *Malone*, the Court did not accept the proposition that the NLRA impliedly pre-empts all state action which affects the outcome of collective bargaining, but instead looked to the legislative history of the Social Security Act (which was enacted

[12]Pre-emption of the Minnesota statute by ERISA was acknowledged, but the case involved state regulation of pension plans prior to the enactment of ERISA.

the same summer as the NLRA) to determine that Congress did not intend the NLRA to prohibit states from providing unemployment compensation benefits to strikers.

The common thread in the Supreme Court's "minimum labor standard" concept is not a dictionary definition of "minimum," nor a requirement that the minimum standards be neutral in their effect on the collective bargaining process, but a judgement that the substantive rights which the state seeks to create are consistent with the "general legislative goals of the NLRA." *Metropolitan Life*, 471 U.S. at 757, 105 S.Ct. at 2398.

These goals are not purely procedural. In enacting the NLRA Congress intended not only to provide for free collective bargaining, but thereby to help the nation overcome a variety of economic problems attributable to depressed and unstable wage rates.[13] Consistency with these goals is the real touchstone of the "minimum labor standard" concept articulated in *Metropolitan Life:*

> The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment. Neither inequality of bargaining power nor the resultant depressed wage rates were thought to result from the choice between having terms of employment set by public law or having them set by private agreement. No incompatibility exists, therefore, between federal rules

[13] "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." 29 U.S.C. § 151.

> designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA. *Metropolitan Life*, 471 U.S. at 754-55, 105 S.Ct. at 2397.

Consistency between the purposes of Section 220 and the express goals of the NLRA therefore provides further support for the conclusion that the prevailing wage standards established under the statute are minimum standards within the meaning of *Metropolitan Life*.

B. ERISA Pre-emption

Whether ERISA pre-empts Section 220 on its face has already been decided by this court in an unpublished memorandum endorsement by Judge Sand in *Rondout Electric Inc., v. New York State Department of Labor, et al.*, 84 Civ. 3095 (S.D.N.Y. 1984) (Sand, J.). The facts in that case were essentially the same as in this one. The plaintiff had entered a contract with a municipality to perform work on its sewage treatment plant, and the state had commenced administrative proceedings to enforce the provisions of Section 220 relating to wage supplements. Without first exhausting its administrative remedies under state law, the plaintiff sought declaratory and injunctive relief based on the theory that ERISA's very broad pre-emption clause, 29 U.S.C. § 1144, invalidates Section 220 on its face.

In granting the state's motion for summary judgment with respect to the ERISA pre-emption claim, Judge Sand reasoned that:

> Plaintiff cannot validly maintain that the New York State prevailing wage law on its face is pre-empted by

> ERISA merely because employee benefit plans are considered in determining the total compensation package paid to employees in the industry and locality. The statute does not require the maintenance of such plans, regulate their terms or do anything other than consider the value to the employee of contributions to such plans as compared to the value of contributions made to similar plans by other employers in the industry and locality. An analogy may be helpful. If it was a practice in a particular industry and locality to pay employee bonuses in United States Savings Bonds, the fact that the actual value of such payments would be considered in determining the "prevailing wage" would no more constitute an invalid intrusion by the state into United States Treasury matters than does New York's consideration of the value of contributions made to federally regulated employee benefit plans. The Court recognizes the broad scope of federal pre-emption where a state in fact seeks to regulate ERISA plans, but such is not the case here. *Id.* at 3.

This reasoning is persuasive and I adopt it to dispose of GE's identical claim. As with the plaintiff in *Rondout*, GE's further claim that Section 220 interferes with employee benefit plans in its practical effect is not ripe for review on this record. If issues exist under either state or federal law as to the propriety of the state's administration of the statutory scheme (including the state's practice of disregarding the cost to an employer of benefits which are deemed not to be prevailing supplements, or the state's possible practice of disallowing excess expenditures for one benefit to be used as a set-off against the employer's

other obligations) then GE may raise them when they are ripe for review.

C. The Applicability of Section 220 to the LIRR

GE claims that application of Section 220 to the LIRR is impermissible under both state and federal law. We are barred by the Eleventh Amendment from considering the state law claim, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984),[14] so the only issue to be decided is whether federal law pre-empts application of Section 220 to work contracted with the LIRR.

GE argues that pre-emption exists on the basis of the general interest of the federal government in regulating railways engaged in interstate commerce. The Commerce Clause clearly gives the federal government the right to regulate interstate railways. *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 682-83, 102 S.Ct. 1349, 1352-53, 71 L.Ed.2d 547 (1982). Thus, Congress *could* enact a statute that would pre-empt application of Section 220 to the railroad's contractors. The issue, though, is whether Congress has in fact enacted such a statute. GE identifies none but urges the view that pre-emption can be based on the fact that Congress has chosen to regulate some other aspects of railroad operations. This is a theory of pre-emption which this court declines to follow.

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[14]GE argues against this conclusion on the theory that the State has waived its Eleventh Amendment immunity by operating a railroad in interstate commerce. *See Parden v. Terminal Railway*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). It is the New York State Department of Labor which is a defendant in this suit, though, not the LIRR. Where the State or one of its agencies is named as the defendant, the Eleventh Amendment clearly does apply. *Pennhurst*, 465 U.S. at 100, 104 S.Ct. at 907.

Conclusion

Having found no merit in plaintiffs claims that Section 220 is pre-empted on its face by the NLRA, ERISA, or other federal statutes, plaintiffs motion for a preliminary injunction is denied.

IT IS SO ORDERED

Dated: September 29, 1988
New York, New York

ROBERT L. CARTER
U.S.D.J.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

Section 1002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1001 *et seq.* (West 1989), provides, in pertinent part:

¶ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death of or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 1144(a) of ERISA (West 1985) provides:

§ 1144. Other Laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any

employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Section 220(3) (first undesig. para.) of N.Y. Labor Law (McKinney 1986) provides, in pertinent part:

> The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined.
>
> * * *

Section 220(3) (second undesig. para.) of N.Y. Labor Law (McKinney 1986) provides, in pertinent part:

> The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality, as hereinafter defined.
>
> * * *

Section 220(3) (third undesig. para.) of N.Y. Labor Law (McKinney 1986) provides:

> It shall be the duty of the fiscal officer, as defined in this section, to ascertain and determine the schedules of supplements to be provided and wages to be paid workmen, laborers and mechanics on such public work, prior to the time of the advertisement for bids, and such schedules shall be annexed to and form a part of the specifications for the work. Such fiscal officer shall file with the department having jurisdiction such schedules to the time of the commencement of the advertisement for bids on all public works proposed to be constructed. The term "contract" as used in this subdivision also shall include reconstruction and repair of any such public work.

Section 220(5)(a) of N.Y. Labor Law (McKinney 1986) provides:

> 5. Definitions. a. The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed. The prevailing rate of wage shall be annually determined in accordance herewith by the fiscal officer no later than thirty days prior to July first of each year, and the prevailing rate of wage for the period commencing July first of such year through June thirtieth, inclusive, of the following year shall be the rate of wages set forth in such collective bargaining agreements for the period commencing July first through June thirtieth, including those increases for such period which are directly ascertainable from such collective bargaining agreements by the fiscal officer in his annual determination. In the event that it is determined after a contest, as provided in subdivision six of this section, that less than thirty percent of the workers, laborers or mechanics in a particular trade or occupation in the locality where the work is being performed receive a collectively bargained rate of wage, then the average wage paid to such workers, laborers or mechanics in the same trade or occupation in the locality for the twelve-month period preceding the fiscal officer's annual determination shall be the prevailing rate of

wage. Laborers, workers or mechanics for whom a prevailing rate of wage is to be determined shall not be considered in determining such prevailing wage.

Section 220(5)(b) of N.Y. Labor Law (McKinney 1990) provides:

b. "Supplements," for the intents and purposes of this article, means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training.

Section 220(5)(c) of N.Y. Labor Law (McKinney 1986) provides:

c. "Prevailing practices in the locality," for the intents and purposes of this article, shall be the practice of providing supplements, as hereinbefore defined, as provided by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality, as determined by the fiscal officer in accordance with the provisions herein.

With respect to each supplement determined to be one of the prevailing practices in the locality, the amount of such supplement shall be determined in the same manner and at the same times as the prevailing rate of wage is determined pursuant to this section.

Supreme Court, U.S.
FILED
MAY 11 1990
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CLERK

No. 89-1590

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,
Petitioners,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT GENERAL ELECTRIC COMPANY IN OPPOSITION

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QUESTION PRESENTED

Are the provisions of the New York prevailing wage law which require that GE provide its employees with locally determined employee welfare and pension benefits preempted by ERISA?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
ADDITIONAL STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Fringe Benefits Regulated By New York's Prevailing Wage Law	2
B. GE Employee Benefit Plans	4
C. Department of Labor Enforcement	4
D. This Action—Motion for Preliminary Injunction	5
SUMMARY OF ARGUMENT	7
REASONS FOR DENYING THE WRIT	8
I. THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT CERTIORARI IN THIS CASE	8
II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE MANDATED BENEFIT PROVISIONS OF NEW YORK'S PREVAILING WAGE LAW RELATE TO EMPLOYEE BENEFIT PLANS AND ARE PREEMPTED BY ERISA	11
A. Section 220 Undermines ERISA's Goal Of Promoting The Cost-Efficient Administration Of Uniform Benefits	11
B. Section 220 Regulates GE's Benefit Contribution Levels And Requires GE To Provide A Locally Determined Level Of Benefits	15

TABLE OF CONTENTS—Continued

Page

C. Section 220 Requires GE To Implement An Ongoing Administrative Scheme 19

D. The Department's Effort To Treat The Mandated Benefit Requirement Of Section 220 As A Wage Statute Is Contrary To The Statutory Definition Of "Supplements" 22

CONCLUSION 23

APPENDIX 1a

TABLE OF AUTHORITIES

Cases Page

Action Elec. Contractors Co. v. Goldin, 64 N.Y. 2d 213, 474 N.E.2d 601, 485 N.Y.S.2d 241 (1984) 3, 13, 16, 17
A.L. Blades & Sons, Inc. v. Roberts, 136 A.D.2d 926, 524 N.Y.S.2d 912 (4th Dep't), *appeal denied*, 72 N.Y.2d 803, 528 N.E.2d 520, 532 N.Y.S. 2d 368 (1988) 3, 13, 16-17
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) 11, 13, 17, 21
Arcudi v. Stone & Webster Eng'g Corp., 463 U.S. 1220 (1983) 15
Atkin v. Kansas, 191 U.S. 207 (1903) 10
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 12, 13, 14, 19, 20, 21, 23
Gilbert v. Burlington Indus. Inc., 477 U.S. 901 (1986) 9, 22
Gilbert v. Burlington Indus. Inc., 765 F.2d 320 (2d Cir 1985), *aff'd mem.*, 477 U.S. 901 (1986) .. 9, 10, 23
Hewlett-Packard v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) 15
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 10
Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989) 8, 15
Local Union 598, Plumber & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co., 109 S. Ct. 210 (1988) 7, 8, 15, 17, 19
Local Union 598, Plumber & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co., 846 F.2d 1213 (9th Cir.), *aff'd mem.*, 109 S. Ct. 210 (1988) 8, 15, 18-19
Martori Bros. Distributors v. James-Massengale, 781 F.2d 1349 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986) 19-20

TABLE OF AUTHORITIES—Continued

	Page
Massachusetts v. Morash, 109 S. Ct. 1668 (1989)	22
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)	11, 15, 16
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	11, 12, 13, 16
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	10, 11, 13, 15, 16, 20, 21
Stone & Webster Eng'g Corp. v. Ilsley, 518 F. Supp. 1297 (D. Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983)	15
White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983)	10
Wisconsin Dep't of Indus., Labor and Human Relations v. Gould Inc., 475 U.S. 282 (1986)	10

Statutes, Rules, and Regulations

29 C.F.R. § 2510.3-1 (1987)	22
Davis-Bacon Act	
40 U.S.C.A. § 276a *et seq.* (West 1986)	21
Employee Retirement Income Security Act of 1974	
29 U.S.C.A. § 1002(1-3) (West Supp. 1990)	16, 22
29 U.S.C.A. § 1002(2)(A) (West Supp. 1990)	2
29 U.S.C.A. § 1002(3) (West Supp. 1990)	2
29 U.S.C.A. § 1144(a) (West 1985)	11, 17, 18
29 U.S.C.A. § 1144(c) (West 1985)	2, 17
29 U.S.C.A. § 1144(d) (West 1985)	21
N.Y. LAB. LAW	
§ 198-c (McKinney 1986)	2, 9, 22
§ 220 (McKinney 1986 & Supp. 1990)	*passim*
§ 220(3) (McKinney 1986)	2, 3
§ 220(3)-a(a) (McKinney 1986)	2, 20
§ 220(3)-a(c) (McKinney 1986)	2, 20
§ 220(5)(a) (McKinney 1986)	3
§ 220(5)(b) (McKinney Supp. 1990)	3, 22
§ 220(5)(c) (McKinney 1986)	3

TABLE OF AUTHORITIES—Continued

	Page
§ 220(5)(d) (McKinney 1986)	3, 18
§ 220(6) (McKinney 1986)	2, 20
§ 220(7) (McKinney 1986)	2, 20
§ 220(8) (McKinney Supp. 1990)	2, 4
§ 220(9) (McKinney 1986)	2
1897 N.Y. Laws ch. 415	3
N.Y. WORK. COMP. LAW §§ 200-242 (McKinney 1965 & Supp. 1990)	16
WASH. REV. CODE ANN. § 39.12.010 *et seq.* (1972)	19
Miscellaneous	
120 CONG. REC. 29197 (1974)	12
H.R. CONF. REP. No. 1280, 93rd Cong., 2d Sess. (1974)	12
N.Y. CONST. art. I, § 17	3
S. CONF. REP. No. 1090, 93rd Cong., 2d Sess. (1974)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1590

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT GENERAL ELECTRIC COMPANY IN OPPOSITION

General Electric Company ("GE") hereby opposes the petition for a writ of certiorari filed by the New York State Department of Labor ("Department").[1]

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[1] Respondent General Electric Company has the following subsidiaries (other than wholly-owned subsidiaries) and affiliates, not including subsidiaries whose shares or debt securities are not publicly held: General Electric Capital Corporation; General Electric Credit Corporation; General Electric Credit International, N.V.; General Electric Overseas Capital Corporation; and RCA Corporation. The New York Apparatus Service Center, which performed the work involved in this action, is a corporate "subentity" of GE.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions reproduced in the Department's appendix at 37a-40a, further applicable statutory provisions are reproduced in the appendix annexed hereto.[2] The relevant federal statutory provisions also include §§ 3(2)(A), 3(3), and 514(c) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§ 1002(2)(A), 1002(3), and 1144(c) (West 1985 & Supp. 1990). The relevant New York State statutory provisions also include N.Y. LAB. LAW §§ 198-c, 220(3), 220(3)-a(a), 220(3)-a(c), 220(6), 220(7), 220(8), and 220(9) (McKinney 1986 & Supp. 1990).

STATEMENT OF THE CASE

ERISA heralded the emergence of a comprehensive and pervasive federal interest in uniform regulation and protection of employee benefit plans. When this interest was created in 1974, it necessarily required the displacement of state action in the field of private employee benefit plans. Thus, Congress' express desire to preempt all state laws left no room for traditional exercises of state power in this field, including the fringe benefit provisions of New York's prevailing wage law.

A. Fringe Benefits Regulated By New York's Prevailing Wage Law

Prior to the enactment of ERISA, the New York Legislature in 1956 amended the State's Prevailing Wage Law ("Section 220") to require for the first time that contractors provide prevailing fringe benefits to their employees as determined by the State Commissioner of Labor ("Commissioner"). The stated purpose of the 1956 amendment was to equalize the labor costs of public work

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[2] References to petitioners' appendix are cited as "——a"; references to the Joint Appendix filed in the Court of Appeals are cited as "JA ——."

contractors and to have the Commissioner, not the contractor, determine the level of health and pension benefits to be provided employees (7a-8a).[3] *See Action Elec. Contractors Co. v. Goldin*, 64 N.Y.2d 213, 221-22, 474 N.E.2d 601, 604-05, 485 N.Y.S.2d 241, 244-45 (1984) ("*Action Electric*"); *A.L. Blades & Sons, Inc. v. Roberts*, 136 A.D.2d 926, 524 N.Y.S.2d 912 (4th Dep't), *appeal denied*, 72 N.Y.2d 803, 528 N.E.2d 520, 532 N.Y.S.2d 368 (1988) ("*A.L. Blades*"). For this purpose all fringe benefits were statutorily denominated "supplements," N.Y. LAB. LAW § 220(3) (McKinney 1986), which in turn were defined as "any payments which are *not 'wages'*." N.Y. LAB. LAW § 220(5)(b) (McKinney Supp. 1990) (emphasis added).

Section 220 measures supplements by their cost to the employer, not their "value to the employee" (8a), and an employer can satisfy its statutory obligation only by providing the locally prevailing benefits or by giving its employees the exact cash cost in lieu of the benefit. *Action Electric*, 64 N.Y.2d at 218, 474 N.E.2d at 602, 485 N.Y.S.2d at 242. Under 1983 amendments to Section 220, the determination was *de facto* given over to unions as the statute now mandates adoption of union wages and benefits for each locality (N.Y. LAB. LAW § 220(5)(a) (McKinney 1986) as well as adoption of the union definition of locality (N.Y. LAB. LAW § 220(5)(d) (McKinney 1986)).[4]

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[3] Neither the historic objectives of the originally enacted prevailing wage law, 1897 N.Y. Laws ch. 415, nor the 1938 incorporation of the then existing statutory provisions into the state constitution, N.Y. CONST. art. I, § 17, are implicated by the Court of Appeals' decision herein.

[4] Since 1983, wages and supplements have been adopted directly from the collective bargaining agreements of employers employing at least 30% of the workers in a particular trade in the relevant locality. N.Y. LAB. LAW § 220(5)(a,c) (McKinney 1986).

B. GE Employee Benefit Plans

GE is a party to a collective bargaining agreement with Local 3 of the International Brotherhood of Electrical Workers ("Local 3"), which agreement establishes terms and conditions of employment and provides for an extensive package of employee fringe benefits provided through eleven nationally administered employee benefit plans (JA 4a-6a, 95a-96a, 104a-107a). GE's employee benefit plans are subject to ERISA and provide GE employees with substantial pension, disability, medical, training, and job and income security benefits. The benefits provided by the plans apply as equally as possible to all GE employees, regardless of the state or locality in which the employees are working (4a).

Pursuant to the provisions of GE's ERISA plans, GE, as administrator of the plans, uniformly administers and applies the terms and provisions of each plan to all participants therein throughout the United States (JA 105a-106a). Uniform administration reduces administrative costs and time delays and provides a greater level of benefits to participants for each dollar contributed to the plans (JA 105a-106a).

C. Department of Labor Enforcement

In January 1987, GE commenced transformer maintenance and repair work for the Long Island Rail Road ("LIRR") in Kings, Queens, Nassau, and Suffolk Counties pursuant to a public work contract (5a). On April 6, 1988, the Commissioner cited GE for violating Section 220 and, without a hearing, ordered the LIRR to withhold $241,117 in payments owed GE (5a-6a).[5] GE was

[5] GE's request for a hearing (*see* N.Y. LAB. LAW § 220(8) (McKinney Supp. 1990)) has not been granted by the Department. Subsequent to the initial withholding, the Department ordered an additional $435,001 withheld for allegedly unpaid supplements. After the Court of Appeals' decision and the District Court's February 1, 1990 direction to the Department to commence a hearing

held responsible for the difference between the cost of prevailing benefits and GE's cost for providing such benefits under its plans, plus interest and penalties (5a).[6] The benefits provided by the GE plans are "different from, and in some cases [cost] less than those which the state claims are due under Section 220" (5a). However, GE received no credit for its cost of providing benefits which were not deemed to be "prevailing benefits" by the Commissioner (5a).

In effect, the Department has determined that GE must modify its plans as well as its recordkeeping procedures solely with respect to employees assigned to work on public work projects, thus undermining the distinct advantages derived from standardized administration of employee benefit plans (JA 108a-109a). Section 220 requires GE, as plan administrator, to modify the plan's eligibility determinations, calculation of benefit levels, disbursements, monitoring of the availability of funds, recordkeeping, and reporting (JA 109a).

D. This Action—Motion for Preliminary Injunction

On July 22, 1988, GE moved for a preliminary injunction to restrain the state from enforcing the withholding notice, from prosecuting GE for its alleged violations, and from enforcing any of the provisions of Section 220 pending a prior hearing (6a; JA 1a-14a). The District Court denied GE's motion on the law holding that ERISA does

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within 6 weeks, the Department, on March 2, 1990 agreed to release the $676,118 which had been withheld from GE upon GE's posting of a bond and agreement to defer the hearing pending review by this Court.

[6] On April 19, 1988, GE was served with a "Notice of Labor Law Investigation Findings" ("Notice") (JA 81a-86a) and ordered to pay the wages and supplements determined by the Commissioner, post on the job site all such wage and supplement rates, and maintain records showing the hours and days worked by each worker and the cost of supplements paid or provided (JA 82a). The Notice threatens GE with both civil and criminal penalties (JA 82a).

not preempt Section 220 (33a-35a). The Court of Appeals vacated and remanded, holding that the supplement provisions of Section 220 are preempted by ERISA (3a).[7]

This holding was based on the Court's finding that:

> Section 220 intrudes into [three] preempted areas. Ex-locality employers such as GE are required either to bring their pension and welfare plans into conformity with those prevailing in the locality (as the prevailing plans are determined to exist by a State fiscal officer on the basis of job classifications made by the Department of Labor) or to make up the difference through cash payments to their employees. The employer is required to keep, and on request to file with the State, sworn schedules of supplements and wages and to make its books and records pertaining to wages, supplements and hours of labor available for inspection by a State fiscal officer. In the event the employer fails to bring a plan into conformity with a similar plan prevailing in the locality, the employee may be required to accept cash payments based on what the employer's cost would have been to accomplish conformity, payments that may be of lesser value to the employee than the unpaid benefits would have been.

(10a-11a) (citations omitted).

The Court of Appeals also focused on the conflicting regulations imposed on GE by the differences between the New York regulatory philosophy and the congressional philosophy embodied in ERISA.

> The Supreme Court holds that under ERISA, "private parties, not the Government, control the level of benefits." The New York courts hold that under section 220, "the Commissioner of Labor, not the

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[7] The Court of Appeals also remanded the issue of whether the 1983 amendments to Section 220 constitute an unlawful delegation of legislative power in violation of the due process clause (6a). The District Court is presently considering cross-motions for summary judgment on a supplemented record on this and other issues.

> contractor, determine[s] the supplements to be provided." These courts are adjudicating in the same area but reaching inconsistent results, and that is exactly what ERISA was designed to prevent.

(9a) (citations omitted).

SUMMARY OF ARGUMENT

The Court should deny the petition for certiorari because there are no special or important reasons for granting it and, in any event, the issue of ERISA preemption was correctly decided by the Court of Appeals. The issue of ERISA preemption of state prevailing wage laws which regulate contribution levels has recently been settled by this Court. *Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co.*, 109 S. Ct. 210 (1988) ("*J.A. Jones*"). In relying on *J.A. Jones* and other applicable ERISA preemption decisions of this Court, the Court of Appeals correctly held that the supplement provisions of Section 220 relate to ERISA plans. As revealed by the legislative history, ERISA's sweeping preemption clause was intended to achieve cost-efficient administration of plans through uniform national regulation, a purpose that is fundamentally at odds with Section 220's goal of equalizing the costs of providing benefits. GE must also implement an ongoing administrative scheme to comply with Section 220 and keep benefit records in a different form and manner than those normally maintained by GE. Since New York's prevailing wage law prescribes the type and amount of an employer's benefit contributions, the rules under which the plan operates, and the nature and amount of benefits provided, it relates to employee benefit plans and is therefore preempted by ERISA.

REASONS FOR DENYING THE WRIT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT CERTIORARI IN THIS CASE

Rule 10.1 of the Rules of this Court provides that review on a writ of certiorari is a matter of judicial discretion which will only be granted for special and important reasons. In the instant case, no such reasons exist as the issue presented has already been settled by this Court. Contrary to the Department's assertion (Pet. 12), ERISA preemption of state prevailing wage laws is not a novel issue for the Court. *J.A. Jones*, 109 S. Ct. 210. In *J.A. Jones* this Court affirmed, without opinion, the decision of the Ninth Circuit Court of Appeals which held that the Washington State prevailing wage statute, that required employers to maintain a certain level of contributions to employee benefit plans, was preempted by ERISA. *Id.* The Department's mischaracterization of this Court's summary affirmance in *J.A. Jones* as a denial of certiorari (Pet. 12) leads it to incorrectly assert that "this Court has not yet addressed the viability of [prevailing wage] laws under ERISA's preemption provision" (Pet. 12). Since the issue has been settled by this Court in a way contrary to the position urged by the Department, the petition does not raise any issues warranting review.

Moreover, the Court of Appeals' holding—that the mandated supplement provisions of New York's prevailing wage law clearly relate to the ERISA plans of employers in GE's position and are therefore preempted by ERISA—coincides with decisions of the Ninth Circuit holding that prevailing wage laws that mandate a contribution level are preempted by ERISA. *See J.A. Jones*, 846 F.2d 1213 (9th Cir.), *aff'd mem.*, 109 S. Ct. 210 (1988); *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Appren'iceship Comm.*, 891 F.2d 719, 729 (9th Cir. 1989) ("*Hydrostorage*") ("[a] law purports to regulate a plan [and is therefore preempted]

if it attempts to reach in one way or another the terms and conditions of employee benefit plans").[8]

In addition, the Department's primary argument for overturning the Court of Appeals' decision, that Section 220 requires no more than the payment of the cash equivalent of the cost difference in benefits and is exempt from preemption as a payroll practice, is foreclosed by this Court's decision in *Gilbert v. Burlington Indus., Inc.*, 477 U.S. 901 (1986), *aff'g*, 765 F.2d 320 (2d Cir. 1985) ("*Gilbert*"), in which this Court summarily affirmed a Court of Appeals decision holding N.Y. LAB. LAW § 198-c (McKinney 1986) preempted by ERISA. *Gilbert*, 765 F.2d 320. The statute at issue in *Gilbert* provides that an employer who fails to pay the amount necessary to provide benefits or furnish "supplements" is guilty of a misdemeanor, N.Y. LAB. LAW § 198-c(1) (McKinney 1986), and defines supplements almost identically to Section 220. Given the parallelism between Section 198-c and Section 220, the Department's repeated reference to Section 220 supplements as a wage provision, notwithstanding the legislature's definition to the contrary (*i.e.*, non-wages), is no more than a disguised attempt to relitigate the preemption issue decided in *Gilbert*. Having determined that claims for "supplements" under Section 198-c are preempted by ERISA, it would be anomalous for this Court to now reject the state legislature's language and conclude that Section 220's supplement provisions are wage payment practices.

Despite the Supreme Court decisions settling these issues, the Department relies upon the state's asserted interest in prevailing wage laws as a reason for granting

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[8] As both circuit courts that have had occasion to address ERISA preemption of state prevailing wage laws agree that state statutes aimed either at enforcing the terms of an ERISA plan or compelling nonsignatory employers to join or comply with such plans are preempted by ERISA, there is no conflict among the circuits within the meaning of Supreme Court Rule 10.1(a).

its petition (Pet. 9-11). In this regard, the Department's reliance on *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) ("*Hughes*"), and *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983), wherein commerce clause challenges to state proprietary activities were rejected, is misplaced because GE has not brought a commerce clause challenge. More importantly, what the commerce clause would permit New York to do in the absence of ERISA is an entirely different question from that posed herein. *Wisconsin Dep't of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 290 (1986). Similarly, *Hughes* specifically held that "[n]othing in the purposes animating the Commerce Clause prohibits a State, *in the absence of congressional action*, from participating in the market and exercising the right to favor its own citizens over others." *Hughes*, 426 U.S. at 810 (emphasis added). Since here, there is a direct congressional mandate to preempt the type of state action exemplified by Section 220, pre-ERISA decisions are of no avail to the Department.[9]

The Department's invocation that "New York's prevailing wage law is an exercise of the State's traditional authority" (Pet. 14) fails to acknowledge that in order for preemption to be avoided, the exercise of state power "must also affect the plans 'in too tenuous, remote or peripheral a manner.'" *Gilbert*, 765 F.2d at 327 (*quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)). Given Section 220's requirement that benefits be paid or provided in addition to those required by GE's collective bargaining agreement, the Department can hardly claim that Section 220 "has only a peripheral effect on benefit plans" (Pet. 14). Exercises of state authority are preempted if they relate to ERISA plans whether or not such authority is traditionally exercised

[9] To the extent that the Department also relies upon *Atkin v. Kansas*, 191 U.S. 207 (1903), that case upheld a state prevailing wage statute which did not require fringe benefits long before ERISA preemption was the law of the land.

by the state. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 736 (1985) ("*Metropolitan Life*").

Accordingly, there are no special or important reasons for granting the Department's petition for a writ of certiorari.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE MANDATED BENEFIT PROVISIONS OF NEW YORK'S PREVAILING WAGE LAW RELATE TO EMPLOYEE BENEFIT PLANS AND ARE PREEMPTED BY ERISA

A. Section 220 Undermines ERISA's Goal Of Promoting The Cost-Efficient Administration Of Uniform Benefits

As this Court has recognized on numerous occasions, Section 514(a) of ERISA, 29 U.S.C.A. § 1144(a) (West 1985), was intended to have a sweeping preemptive effect in the employee benefit plan field because Congress intended ERISA to occupy and regulate the field. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) ("*Pilot Life*"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98-100 (1983) ("*Shaw*").

In *Pilot Life*, this Court summarized its teachings on the scope of ERISA preemption as follows:

> [T]he express pre-emption provisions of ERISA are deliberately expansive, and designed to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 US 504, 523, 68 L Ed 2d 402, 101 S Ct 1895 (1981). As we explained in *Shaw v. Delta Air Lines, Inc.*, 463 US 85, 98, 77 L Ed 2d 490, 103 S Ct 2890 (1983):
>
> > "The bill that became ERISA originally contained a limited preemption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected those provisions in favor of the

> present language, and indicated that section's pre-emptive scope was as broad as its language. See HR Conf Rep No. 93-1280, p 383 (1974); S Conf Rep No. 93-1090, p 383 (1974)."

The House and Senate sponsors emphasized both the breadth and importance of the pre-emption provisions. Representative Dent described the "reservation to Federal authority the sole power to regulate the field of employee benefit plans" as ERISA's "crowning achievement." 120 Cong Rec 29197 (1974). Senator Williams said:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law."

Pilot Life, 481 U.S. at 45-46.

This Court has further stated that:

> It is thus clear that ERISA's preemption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) ("*Fort Halifax*").[10]

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[10] At the time of ERISA's passage, Representative Dent stated that "with the preemption of the field [of employee benefit plans],

The Court of Appeals' holding, that Section 220 falls within the class of state laws preempted by ERISA, is entirely consistent with and indeed mandated by this Court's teachings on the broad scope of ERISA preemption.

Relying on relevant Supreme Court precedent, the Court of Appeals found that Section 220 relates to ERISA plans in several respects. Initially, the Court of Appeals recognized the fundamental conflict between ERISA's goal of promoting the cost-efficient administration of employee benefit plans and Section 220's regulation of the cost of benefits:

> The Supreme Court holds that under ERISA, "private parties, not the Government, control the level of benefits." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). The New York courts hold that under section 220, "the Commissioner of Labor, not the contractor, determine[s] the supplements to be provided." *A.L. Blades & Sons, Inc. v. Roberts, supra*, 136 A.D.2d at 927. These courts are adjudicating in the same area but reaching inconsistent results, and that is exactly what ERISA was designed to prevent. *See* statements of Senator Williams and Congressman Dent quoted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983).

(8a-9a). Thus, while ERISA aims to reduce the cost of administering employee benefit plans to enable employers to provide greater benefits, *Fort Halifax*, 482 U.S. at 12, Section 220's supplement provisions were designed to equalize labor costs to remove a perceived unfair advantage of contractors who had to pay less for fringe benefits. *Action Electric*, 64 N.Y.2d 213, 474 N.E.2d 601, 485 N.Y.S.2d 241.

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we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." *Fort Halifax*, 482 U.S. at 9.

Having found that "Section 220 measures supplements by their cost to the employer, not their 'value to the employee'" (8a), the Court of Appeals recognized that the state statute operates primarily to increase the cost of providing benefits and is incompatible with ERISA. As an employer with employees in many states, the most efficient way for GE to provide benefits to those employees is to establish a uniform administrative scheme which provides a set of standard procedures to guide disbursement of benefits. *Fort Halifax*, 482 U.S. at 9. ERISA recognizes that the most cost-efficient way of providing benefits is through uniform national plans. Thus, GE has implemented the benefit programs which Congress sought to encourage. Section 220, on the other hand, requires daily recalculation of the benefits owed and thus undermines ERISA's purpose of encouraging the establishment of nationwide plans which provide benefits efficiently by permitting uniform administration. By mandating the costs to be borne by employers providing ERISA benefits, Section 220 frustrates ERISA's goal of promoting efficient administration of uniform benefits and discriminates against employers such as GE who are able to provide an extensive array of benefit plans at lower costs than small local plans.[11] In effect, the Department's Notice (JA 81a-86a) punishes GE for doing what ERISA was designed to encourage—providing more comprehensive benefits at lower cost. Essentially, Section 220 taxes away all of GE's cost savings achieved through nationally established and administered benefit plans. Accordingly, the Court of Appeals correctly held that the basic purposes of ERISA and the supplement provisions of Section 220 are fundamentally incompatible.

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[11] Section 220 requires that the economic efficiencies achieved by GE through its uniform administration of the GE plans be forfeited for GE employees assigned to work on the LIRR project (JA 109a). This is inconsistent with the congressional goal of promoting standardized administration of employee benefit plans.

B. Section 220 Regulates GE's Benefit Contribution Levels And Requires GE To Provide A Locally Determined Level Of Benefits

In addition to demonstrating the fundamental conflict between the purposes of Section 220 and ERISA, the Court of Appeals found that Section 220 relates to ERISA plans in three prohibited areas: the statute prescribes the type and amount of an employer's contributions to a plan, the rules and regulations under which a plan operates, and the nature and amount of the benefits provided thereunder (10a).

State statutes regulating contributions to ERISA plans have consistently been held preempted. *J.A. Jones*, 109 S. Ct. 210 (1988); *Hydrostorage*, 891 F.2d at 129-130; *Stone & Webster Eng'g Corp. v. Ilsley*, 518 F. Supp. 1297, 1300-01 (D. Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983) (*"Stone & Webster"*); *Hewlett-Packard v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) (*"Hewlett-Packard"*). In doing so, the courts have rejected the contention that various state laws relating only to the level of contributions to an ERISA plan, rather than to the composition or administration of benefits, are not subject to preemption. *J.A. Jones*, 846 F.2d at 1218-1219; *Stone & Webster*, 518 F. Supp. at 1301; *Hewlett-Packard*, 425 F. Supp. at 1297-1300. Thus, if a state statute is designed to increase either an "employer's negotiated obligations" or "the cost which is to be borne by the employer," the statute is preempted by ERISA. *Stone & Webster*, 518 F. Supp. at 1301.

In urging that Section 220 is not preempted, the Department has overlooked precedent from this Court holding that state laws relate to employee benefit plans if they mandate benefits of the type ERISA covers. *Metropolitan Life*, 471 U.S. at 739; *Shaw*, 463 U.S. at 97.

In this case, the Department seeks to hold GE liable under Section 220 because of insufficient expenditures for pension, health/welfare, apprenticeship training, annuity, vacation, holiday, and dental benefits (JA 81a-86a). These types of benefits are expressly covered by ERISA, 29 U.S.C.A. § 1002(1-3) (West Supp. 1990), and may not be regulated by the states. *Pilot Life*, 481 U.S. at 47-48. Since none of the ERISA exemptions (*e.g.*, laws which regulate insurance, *cf. Metropolitan Life*, 471 U.S. 724) apply in this case, Section 220's relation to employee benefit plans required the Court of Appeals' holding that the statute was preempted by ERISA.

Similarly the Department has ignored this Court's finding in *Shaw*, 463 U.S. 85, that the provisions of New York's Disability Benefits Law, N.Y. WORK. COMP. LAW §§ 200-242 (McKinney 1965 & Supp. 1990), which required employers to pay specific benefits to employees, clearly related to benefit plans. *Id.* at 97.[12] Here Section 220 relates to employee benefit plans because it requires employers to provide specific ongoing benefits to employees.

While the New York Court of Appeals has interpreted Section 220 to allow employers the option of satisfying their Section 220 obligations by paying the "cash equivalent" of a supplement, the court did not modify the statutory obligation that an employer provide fringe benefits based on prevailing practices in a locality. *Action Electric*, 64 N.Y.2d 213, 474 N.E.2d 601, 485 N.Y.S.2d 241. In any event, the cash equivalent option increases costs for providing certain plan benefits and requires all contractors to comply with a particular level of contributions set by the Department for a locality based on the state legislature's intent to impose fixed cost levels for providing benefits to employees. *A.L. Blades*, 136 A.D.2d

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[12] While ERISA's exemption of state disability insurance laws saved the statute in *Shaw* from preemption, ERISA contains no exemption designed to save Section 220 from preemption.

926, 524 N.Y.S.2d 912. The cash equivalent option is merely an enforcement tool which does not affect the underlying obligation to provide health, welfare, and pension benefits on a locality by locality basis. Here the problem was extreme. Since the LIRR work was performed in two adjacent localities, GE had varying obligations to provide varying benefits each day it performed work on the project (JA 123a-125a). Even if the cash equivalent option were viewed as an indirect regulation of contribution levels to employee benefit plans, it would nevertheless run afoul of ERISA's broad preemption clause. 29 U.S.C.A. § 1144(c)(2) (West 1985). As this Court observed in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) ("*Alessi*"):

> It is of no moment that [the state] intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern . . . . *ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision.*

Id. at 525 (emphasis added).

While the cash equivalent option, added by judicial interpretation in *Action Electric* over the objection of the Department, was not part of the Washington prevailing wage law at issue in *J.A. Jones*, the essential issue is the same: whether state laws which require equivalence between benefits provided by national ERISA plans and locally prevailing benefits relate to those ERISA plans. The option of providing a variable, added payment directly to employees does not take Section 220 out of the scope of the congressional intent to leave ERISA plans totally free from state regulation. 29 U.S.C.A.

§ 1144(a) (West 1985). Otherwise every local jurisdiction could require employers to pay locally prevailing benefits and the congressional goal of freeing employers who maintain ERISA plans from inconsistent state and local regulation would be frustrated.

The State's imposition of daily and recurring added costs to providing benefits is one evil that Section 514(a) was enacted to proscribe. The magnitude of the evils to uniform plan administration caused by the Section 220 locality comparisons can not be overstated. Simply put, they completely frustrate the congressional purpose of encouraging the establishment of uniform national benefit plans. If ERISA does not preempt the supplement provisions of Section 220, every county in the state, or the nation for that matter, could assess a different cost to interstate ERISA plans based on local practice. To make matters worse, the scope of the "locality" under Section 220 is not determined by the state, but rather by unions who engage in collective bargaining. N.Y. LAB. LAW § 220(5)(d) (McKinney 1986).

Clearly Congress did not intend to allow this type of state interference with benefit plans. Section 514(a) was enacted with the broad "relates to" test to preclude local regulation of ERISA plans. If Section 220 is not preempted, any tax, fee, or obligation imposed on plan contributions or benefits mandated by a state—if payable in cash by the employer maintaining an ERISA plan—would be outside the scope of Section 514(a) preemption.

Since Section 220 mandates the provision of a locally determined level of employee benefits or their cost equivalent, it relates to GE's ERISA plans and is a type of regulation that is indistinguishable from the Washington statute which also mandated a locally determined level of employer contributions to an ERISA plan. *J.A. Jones,*

846 F.2d at 1214. The mechanism by which an added payment is exacted is not the issue. Rather, it is the intrusion by the state into the level of contributions which is prohibited. Since the State has taken the position that GE has not spent enough on its benefit plans, Section 220 "relates to" GE's employee benefit plans.

Thus the Department's attempt to require GE to provide additional benefits is no more justified than the pension fund's claim in *J.A. Jones* for additional monies for the added value of prevailing benefits. *Compare* N.Y. LAB. LAW § 220 (McKinney 1986 & Supp. 1990) *with* WASH. REV. CODE ANN. § 39.12.010 *et seq.* (1972).

C. Section 220 Requires GE To Implement An Ongoing Administrative Scheme

Section 220 requires considerably more administration than a one-time, lump-sum payment triggered by a single event. *Cf. Fort Halifax*, 482 U.S. at 12. It requires GE to implement an ongoing administrative program to monitor and record the cost of benefits provided to employees in order to determine whether additional benefits or payments are required on any given workday for the supplements included on the prevailing wage schedule for each work site (JA 82a). When a worker is transferred from one locality to another, GE must recalculate the difference between its benefit costs and the cost of the prevailing supplements (JA 123a-125a).

As the Court of Appeals stated:

> there is not even unity as between Nassau/Suffolk Counties on the one hand and Kings/Queens Counties on the other. Moreover, GE cannot eliminate the differences by single cash payments, as in *Fort Halifax Packing Co. v. Coyne*, *supra*, 482 U.S. at 12; *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1358 (9th Cir.), *cert. denied*, 479 U.S.

949 (1986); it is required to make continuous calculations, adjustments and payments.

(9a).[13]

To comply with Section 220 and the Department's Notice herein, GE must establish an ongoing administrative scheme to determine whether a particular worker is employed on the LIRR project, the amount of supplements provided, the occupations of the workers, and their hours of employment (JA 82a). In addition the plans must keep records on the number of hours worked by each employee on the project for the week. They also have to make regular disbursements to employees and keep appropriate records to comply with the statute.[14] *See Fort Halifax*, 482 U.S. at 9. Since GE must adopt financial coordination and control mechanisms to meet Section 220's periodic demands, Section 220 directly affects administration of GE's employee benefit plans. *Id.* at 12. ERISA's comprehensive preemption of state law was meant to preclude this sort of interference with the administration of employee benefit plans so that employers would not have to administer their plans differently in

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[13] Even if the requirements of Section 220 were uniform throughout the state, GE would still be subject to different contribution requirements in different states (Pet. 10 n.7). Obligating an employer to satisfy a wide variety of state prevailing wage laws makes administration of a nationwide plan more difficult. *Shaw*, 463 U.S. at 105 n.25.

[14] The Department's portrayal of the recordkeeping requirements (N.Y. LAB. LAW §§ 220(3)-a(a, c), (6), (7) (McKinney 1986)) as *de minimis* is inconsistent with its citation of GE for violating such requirements (JA 81a-82a). Section 220 requires GE to keep records in a different form and manner from those normally maintained by GE (JA 108a). A state law requiring an employer to keep records of its benefit plans clearly "relates to" those plans. Thus the recordkeeping requirement by itself is sufficient to warrant preemption as Congress intended that benefit administrators be required to comply only with federal recordkeeping provisions. *Fort Halifax*, 482 U.S. at 9.

each state in which they have employees. *Fort Halifax*, 482 U.S. at 10.[15]

The Department's assertion that Section 220 "mirror[s] similar federal requirements embodied in such laws as the Davis-Bacon Act, 40 U.S.C.A. § 276a *et seq.*" (Pet. 10) is of no avail. First, Section 220 is not a mirror of Davis-Bacon. More importantly, Davis-Bacon is a *federal* statute and ERISA does not preempt federal statutes. 29 U.S.C.A. § 1144(d) (West 1985).[16] The desirability of uniform administration of national plans would be severely undercut by the need to comply with a patchwork of conflicting state prevailing wage laws. By establishing benefit plan regulation as exclusively a federal concern, Congress intentionally "minimized the need for interstate employers to administer their plans differently in each State in which they have employees." *Shaw*, 463 U.S. at 105.

Section 220 requires GE to accommodate conflicting regulatory schemes by devising and operating inefficient local systems for providing employee benefits. *Alessi*, 451 U.S. 504.[17] This was precisely the burden that ERISA preemption was intended to avoid. *Fort Halifax*, 482 U.S. at 10.

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[15] As this Court has previously recognized, this type of situation produces considerable inefficiencies which an employer might choose to offset by lowering benefit levels or eliminating benefits not required by any state. *Fort Halifax*, 482 U.S. at 13; *Shaw*, 463 U.S. at 105 n.25.

[16] While Section 514(d) of ERISA may operate to exempt from preemption those provisions of state laws upon which federal laws depend for their enforcement, *Shaw*, 463 U.S. at 104, Davis-Bacon does not depend on New York's prevailing wage law for its enforcement.

[17] As in *Alessi*, where this Court struck down a New Jersey statute that prohibited offsetting worker compensation payments against pension benefits, Section 220 prohibits GE from substituting one form of supplement for another since the Department ignores the costs which GE expends on benefits which are not deemed to be prevailing (5a).

D. The Department's Effort To Treat The Mandated Benefit Requirement Of Section 220 As A Wage Statute Is Contrary To The Statutory Definition Of "Supplements"

Recognizing that state regulation of employee benefits is prohibited (Pet. 14), the Department strains to depict Section 220's regulation of contractors' benefit costs as a wage provision. Relying on *Massachusetts v. Morash*, 109 S. Ct. 1668 (1989) ("*Morash*"), the Department asserts that "[t]he cash payments required by the prevailing wage law are functionally identical to vacation pay, holiday pay, premium pay or any other typical wage payment" (Pet. 15). The Department neglects to mention, however, that the payments required by Section 220 in this case involved contribution levels for pension, health/welfare, apprenticeship training, annuity, dental, and like benefits (JA 83a-86a, 123a-125a). Such benefits are expressly covered by ERISA. 29 U.S.C.A. § 1002(1-3) (West Supp. 1990); 29 C.F.R. § 2510.3-1(a)(2) (1987).

While the Department asserts that the payments required by Section 220 are "functionally identical" to wage payments (Pet. 15), Section 220 itself defines "supplements" as "any payments which are not 'wages.'" N.Y. LAB. LAW § 220(5)(b) (McKinney Supp. 1990). In contrast, the Massachusetts statute at issue in *Morash* specifically stated that "[t]he word 'wages' shall include any holiday or vacation payments. . . ." *Morash*, 109 S. Ct. at 1670 n.1. Since supplements under Section 220 are not wages, wages are not involved on this appeal.[18]

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[18] GE's providing of fringe benefits to its employees does not constitute a payroll practice under 29 C.F.R. § 2510.3-1(b). Payroll practices cover overtime and shift premiums as well as payments of compensation out of an employer's general assets during periods the employee does not perform his or her employment duties. 29 C.F.R. § 2510.3-1(b) (1987). As noted above, to conclude otherwise would conflict with this Court's decision in *Gilbert*, 477 U.S. 901, that N.Y. LAB. LAW § 198-c (McKinney 1986), which defines supplements in the same fashion as Section 220, was preempted by ERISA.

Contrary to what the Department seems to be urging, ERISA preemption does not depend on whether an employer's fringe benefit plans are funded or unfunded. *Fort Halifax*, 482 U.S. at 17-18; *Gilbert*, 765 F.2d 320. ERISA protects employee expectations of benefits even when such benefits are paid out of general assets. *Fort Halifax*, 482 U.S. at 18. Whether the funds to pay a benefit come from a trust fund or from the company's general assets, the funds must be provided through an ongoing administrative scheme. As far as ERISA is concerned, there is no difference between providing benefits directly to the employee out of general assets and providing benefits out of general assets to a trust fund which pays it to the employee, as long as an ongoing administrative scheme is required.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

ADDITIONAL RELEVANT STATUTORY PROVISIONS

Section 3(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1002(2)(A) (West Supp. 1990), provides:

> § 1002. Definitions
>
> For purposes of this subchapter:
>
> (2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> > (i) provides retirement income to employees, or
> >
> > (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Section 3(3) of ERISA, 29 U.S.C.A. § 1002(3) (West Supp. 1990), provides:

> § 1002. Definitions
>
> For purposes of this subchapter:
>
> (3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both

an employee welfare benefit plan and an employee pension benefit plan.

Section 514(c) of ERISA, 29 U.S.C.A. § 1144(c) (West 1985), provides in relevant part:

> § 1144. Other laws
>
> (c) Definitions
>
> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. * * *
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Section 198-c of New York Labor Law (McKinney 1986) provides:

> 1. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in section one hundred ninety-eight-a of this article. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.
>
> 2. As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses; health, welfare and retire-

ment benefits; and vacation, separation or holiday pay.

Section 220(3) (second undesignated paragraph) of New York Labor Law (McKinney 1986) provides in relevant part:

> The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality, as hereinafter defined. Serving laborers, helpers, assistants and apprentices * * * shall be provided supplements in accordance with the prevailing practices as hereinafter defined. * * * The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be in accordance with the prevailing practices in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be provided the supplements as required in this article.

Section 220(3) (fourth undesignated paragraph) of New York Labor Law (McKinney 1986) provides:

> Any person or corporation that wilfully pays or provides after entering into such contract, less than such stipulated wage scale or supplements as established by the fiscal officer shall be guilty of a misdemeanor and upon conviction shall be punished for such first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has oc-

curred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state, municipal corporation or commission or board appointed pursuant to law pay the same or authorize its payment from the funds under his charge or control to any person or corporation for work done upon any contract, on which the contractor has been convicted for second offense in violation of the provisions of this section.

Section 220(3)-a(a) of New York Labor Law (McKinney 1986) provides in relevant part:

> * * * it shall be the duty of the fiscal officer * * * to make a determination of the schedules of wages and supplements to be paid or provided, as the case may be, therefor. The contractor and every subcontractor on public works contracts shall post in a prominent and accessible place on the site of the work a legible statement of all wage rates and supplements as specified in the contract to be paid or provided, as the case may be, for the various classes of mechanics, workingmen, or laborers employed on the work. The contractor and every sub-contractor shall keep original payrolls or transcripts thereof, subscribed and affirmed by him as true under the penalties of perjury, showing the hours and days worked by each workman, laborer or mechanic, the occupation at which he worked, the hourly wage rate paid and the supplements paid or provided, on the site of the work where the contractor or subcontractor maintains no regular place of business in New York state and where the amount of the contract is in excess of twenty-five thousand dollars. All other contractors or sub-contractors shall produce within five days on the site of the work and upon formal order of the commissioner or his designated representative such original payrolls or tran-

scripts thereof, subscribed and affirmed by him as true under the penalties of perjury, as may be deemed necessary to adequately enforce the provisions of this article. The original payrolls or transcripts shall be preserved for three years from the date of completion of the work on the awarded contract. * * *

Section 220(3)-a(c) of New York Labor Law (McKinney 1986) provides:

> The fiscal officer may require any person or corporation performing such public work to file with the fiscal officer within ten days of receipt of said request, payroll records, sworn to as to their validity and accuracy, requested by the fiscal officer, for said public work or any public or private work performed by said person or corporation during the same period of time as said public work. In the event said person or corporation fails to provide the requested information within the allotted ten days, the fiscal officer shall, within fifteen days, order the department of jurisdiction to immediately withhold from payment to said person or corporation up to twenty-five percent of the amount, not to exceed one hundred thousand dollars, to be paid to said person or corporation under the terms of the contract pursuant to which said public work is being performed. Said amount withheld shall be immediately released upon receipt by the department of jurisdiction of a notice from the fiscal officer indicating that the request for records had been satisfied.

Section 220(6) of New York Labor Law (McKinney 1986) provides:

> The fiscal officer, may, and on the written request of any interested person shall, require any person or corporation performing such public work to file with such fiscal officer schedules of the supplements to be

provided and wages to be paid to such laborers, workmen or mechanics. Any such person or corporation shall, within ten days after the receipt of written notice of such requirement, file with the fiscal officer such schedules of wages and supplements. An employer may contest a determination by the fiscal officer under paragraphs a and c of subdivision five of this section. The employer must allege and prove by competent evidence, that the actual percentage of workers, laborers or mechanics is below the required thirty per centum and during the pendency of any such contest and until final determination thereof, the work in question shall proceed under the rate established by the fiscal officer.

Section 220(7) of New York Labor Law (McKinney 1986) provides:

Compliance investigations. The fiscal officer as herein defined shall on a verified complaint in writing of any person interested or of any employee organization pursuant to subdivision eight-d, and may on his own initiative cause a compliance investigation to be made to determine whether the contractor or a subcontractor has paid the prevailing rate of wages and prevailing practices for supplements in the same trade or occupation in the locality within the state where such public work is being performed, or the hours of labor performed by the workmen, laborers and mechanics employed on such public work, or both. The fiscal officer or his agents, examiners and inspectors may examine or cause to be examined the books and records pertaining to the rate of wages paid and supplements provided to the laborers, workmen and mechanics on said public work and the hours of labor performed by such laborers, workmen and mechanics on said public work. The fiscal officer in such investigation shall be deemed to be acting in a judicial capacity, and shall have the right to

issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such fiscal officer shall make an order or determination not later than six months after the filing of such verified complaint.

Section 220(8) of New York Labor Law (McKinney Supp. 1990) provides in relevant part:

> Hearings. Before issuing an order or determination as provided in subdivision seven, the fiscal officer shall order a hearing thereon at a time and place to be specified, and shall give notice thereof, together with a copy of such complaint or the purpose thereof, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on any person or corporation affected thereby; such person or corporation shall have an opportunity to be heard in respect to the matters complained of at the time and place specified in such notice, which time shall be not less than five days from the service of the notice personally or by mail. * * * Such hearing shall be expeditiously conducted and upon such hearing the fiscal officer shall determine the issues raised thereon and shall make and file an order in the office of the fiscal officer stating such determination, and forthwith serve a copy of such order, with a notice of the filing thereof, upon the parties to such proceeding, personally or by mail. Such order shall direct payment of wages or supplements found to be due, including interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment, provided, however, that such interest rate shall not apply to subdivision eight-c of this section.

> In addition to directing payment of wages or supplements including interest found to be due, such order may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other non-wage requirements. * * *

Section 220(9) of the New York Labor Law (McKinney 1986) provides:

> When a final determination has been rendered, any person, or corporation that wilfully refuses thereafter to pay the rate of wages or to provide the supplements determined to be prevailing, or wilfully employs on such public work, laborers, workmen or mechanics more than the hours per day determined by said order until modified by order of the fiscal officer or court and thereby violates the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished, for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state or of a municipal corporation pay the same or authorize its payment from the funds under his charge or control to any such person or corporation for work done upon any contract, on which the contractor has been convicted of second offense in violation of the provisions of this section.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR, THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE WRIT 4

I. **THE COURT OF APPEALS DECISION THAT LABOR LAW §220 IS PREEMPTED BY ERISA UNDERMINES THE PURPOSE AND EFFECT OF NEW YORK'S PREVAILING WAGE LAW AND JEOPARDIZES THE EFFECTIVENESS OF THE PREVAILING WAGE LAWS OF MANY OTHER STATES.** 4

II. **THE COURT OF APPEALS' ERRONEOUS INTERPRETATION OF SECTION 514 OF ERISA NULLIFIES THE EXERCISE OF THE TRADITIONAL POLICE POWERS OF THE STATE OF NEW YORK AND THREATENS THE EXERCISE OF THE TRADITIONAL POLICE POWERS OF MANY OTHER STATES.** 11

A. The Court of Appeals Misinterpreted Section 514 of ERISA. 12

B. The Decision of the Court of Appeals Nullifies the Power of the State of New York to Address a Legitimate Local Need. 13

CONCLUSION 15

QUESTION PRESENTED

Does ERISA preempt state prevailing wage statutes which recognize, but do not regulate, the value of employer contributions to employee benefit plans in determining whether an employer has paid the prevailing wage to employees performing services with respect to public work projects?

TABLE OF AUTHORITIES

Cases **Pages**

Action Electrical Contractors Company v. Goldin
64 N.Y. 2d 213 (1984) 7

Aetna Life Insurance Company v. Borges
869 F.2d 142 (2nd Cir. 1989) 8, 9, 10, 13

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 14

American Progressive Life & Health Insurance Co. v. Corcoran 715 F.2d 784 (2nd Cir. 1983) 10

Decanas v. Bica 424 U.S. 351 (1976) 14

Fort Halifax Packing Co. Inc. v. Coyne
482 U.S. 1 (1987) 14, 15

Gilbert v. Burlington Industries, Inc.
765 F.2d 320 (2nd Cir. 1985) 14

Lane v. Goren
743 F.2d 1337 (9th Cir. 1984) 9

Local Union 598, Plumbers and Pipefitters Industry Journeymen and Apprentices Training Fund v. J.A. Jones Construction Co. 846 F.2d 1213
(9th Cir. 1988) 9

Massachusetts v. Morash,
___ U.S. ___, 109 S.Ct. 1668 (1989) 8, 11, 14

Metropolitan Life Insurance Co. v. Massachusetts
471 U.S. 724 (1985) 14

Rebaldo v. Cuomo
749 F.2d 133 (2nd Cir. 1984) 8, 9, 10, 13, 14

Shaw v. Delta Airlines, Inc.
463 U.S. 85 (1983) 3, 4, 8, 12, 13

Stone v. Webster Engineering Corporation
690 F.2d 323 (2nd Cir. 1982) 9

United States v. Binghamton Construction Co.
347 U.S. 171 *reh'q denied* 347 U.S. 940 (1954) 11

Universities Research Association, Inc. v. Coutu
450 U.S. 754 (1981) 11

STATUTES

Davis-Bacon Act, 40 U.S.C. §276a
et seq. (West 1986) 5, 10, 11

Employee Retirement Income Security Act of 1974
(ERISA) § 514(d), 29 U.S.C. §1144(d)
(West 1985) .....*passim*

New York Labor Law §220 (McKinney 1986) .....*passim*

Ohio Rev. Code Ann. §4115.03 (Page 1978) 1

MISCELLANEOUS AUTHORITIES:

H.R. Rep. No. 308, *Amendments to the Davis-Bacon Act,*
88th Cong., 1st Sess., 2-3 (1963) 6

STATEMENT OF INTEREST

Amici Curiae submit this brief in support of Petitioner New York State Department of Labor urging that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above action on November 29, 1989, in order to protect and preserve the respective prevailing wage laws of the amici states represented herein.

At issue is the prevailing wage law of New York, Labor Law §220, which requires the payment of the prevailing wage rate and supplemental rate to each employee on a public work project. The United States District Court for the Southern District of New York held that Labor Law §220 was not preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001 *et seq.*, while the United States Court of Appeals for the Second Circuit (Court of Appeals) reversed and held that the provisions of Labor Law §220 were preempted. The amici states represented herein also have prevailing wage statutes and their respective state statutes are threatened by the ruling of the Court of Appeals.

During the depression era, many state legislatures began enacting laws "to establish a fair rate of wages to be paid to workmen and mechanics employed in construction of public improvements." Ohio Rev. Code Ann. §4115.03 *et seq.* (Page 1978). The legislative intent of the acts was simple: to provide a comprehensive uniform framework for workers' rights and remedies vis-a-vis private contractors, subcontractors and materialmen engaged in the construction of public improvements of the state.

A number of states, including New York, have enacted laws that require public work project contractors to pay a prevailing wage to its employees. A majority of these state prevailing wage laws recognize fringe benefits in determining

prevailing wages.[1] To determine that ERISA preempts these state prevailing wage laws prevents a state from providing equal opportunities to public work contractors, protecting the living standards of public work project employees and keeping the local economy free from disturbance.

The resolution of the issues presented in this case will have a substantial impact upon the continued protection of employees and contractors who work on public work projects, and on the economy of the locality of the public work project under construction. This protection currently exists through the enforcement of the states' prevailing wage laws, including those of the amici states herein. Like Labor Law §220, the amici states have enforcement provisions within their respective prevailing wage laws which recognize an employer's contribution to an employee benefit plan in determining the total compensation package received by an employee on a public work project. Neither Labor Law §220 nor the prevailing wage laws of the amici states require that employers establish, contribute to or otherwise maintain an employee benefit plan to comply with the prevailing wage requirements. Notwithstanding this absence of state regulation of employee benefit plans, the Court of Appeals found Labor Law §220 to be preempted by ERISA. Said

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[1] Alaska, Alaska Stat. §36.05.010(7)(1982); California, Cal. Lab. Code § 1773.1 (West 1989); Connecticut, Conn. Gen.Stat. §31-53 (1987);Hawaii, Haw. Rev. Stat. §§104-1 (1985); Illinois, Ill. Ann. Stat. Ch. 48, para. 39S-2 (Smith-Hurd 1986); Kansas, Kans. Stat. Ann. §44-201; Kentucky, Ky. Rev. Stat. §337.505 (Baldwin 1982); Maryland, Md. Stat. Fin. & Proc.Code Ann., §17-208(1988); Massachusetts, Mass. Gen. Laws Ann. Ch. 149, § 27 (West 1982); Michigan, Mich. Comp. Laws §408.552 (1985); Minnesota, Minn. Stat. Ann. §177.42 (West 1989); Missouri, Mo. Rev. Stat. §290.210-345 (Vernon 1989); Montana, Mont. Code Ann. §18-2-403 (1989); Nevada, Nev. Rev. Stat. §§338-010-338-130 (1989); New Mexico, N.M. Stat. Ann. §13-4-11 et seq. (1953); Ohio, Ohio Rev. Code Ann. 4115.03 (Page's 1980); Oklahoma, Okla. Stat. Ann. tit. 40 §1961 (West 1980); Oregon, Or. Rev. Stat. §279.348 (1987); Pennsylvania, Pa. Stat. Ann. tit. 43 §165-7 (Purdon 1964); Rhode Island, R.I. Gen. Laws §§37-13-4-37-13-14(1984); Texas, Texas Lab. Code Ann. §5159a (Vernon 1987); Washington, Wash. Rev. Code Ann. §39.12.010 (1972); Wisconsin, Wis. Stat. Ann. §103.39 (West 1988); Wyoming, Wyo. Stat. §27-4-405 (1977).

decision will have a strong and adverse impact upon the continued enforcement of state prevailing wage laws; therefore, the amici states represented herein respectfully request this Court to grant certiorari in order to resolve these issues and concerns regarding Labor Law §220.

SUMMARY OF ARGUMENT

New York's prevailing wage law, Labor Law §220, which requires a minimum rate of pay to employees on state public work projects, is not preempted by ERISA. ERISA preempts state laws which regulate, directly or indirectly, employee benefit plans covered by ERISA. This Court has held that those state laws which affect ERISA covered employee benefit plans in too remote, tenuous or peripheral a manner are not preempted under ERISA. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983).

Labor Law §220 does not directly or indirectly regulate employee benefit plans. Labor Law §220, like the prevailing wage laws of many other states, takes into consideration an employer's contribution to employee benefit plans in calculating the prevailing rate of wages. There is no mechanism within Labor Law §220 which would permit the state to regulate employee benefit plans covered by ERISA. Further, the employer retains control over the selection and administration of employee benefit plans.

The majority in the decision below overstated the impact of the ERISA preemption clause and departed from previous federal court decisions in the area of ERISA preemption. The majority decision nullifies the power of the State of New York to address a legitimate local need, and this decision threatens the ability of many other states to also address legitimate local needs and concerns. The decision of the court below has far-reaching effects upon state laws which were never intended by Congress when it enacted ERISA. For these reasons, Amici Curiae respectfully request that this Court grant certiorari so that these far-reaching effects of the majority decision below are reviewed and ultimately avoided.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION THAT LABOR LAW §220 IS PREEMPTED BY ERISA UNDERMINES THE PURPOSE AND EFFECT OF NEW YORK'S PREVAILING WAGE LAW AND JEOPARDIZES THE EFFECTIVENESS OF THE PREVAILING WAGE LAWS OF MANY OTHER STATES.

New York Labor Law §220 mandates a prevailing wage rate and does not directly or indirectly regulate employee benefit plans. The effect, if any, of Labor Law §220 on employee benefit plans is "too tenuous, remote or peripheral" to be preempted by ERISA." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21. (1983) Labor Law §220 does not require that contractors on public work projects establish, maintain or contribute to employee benefit plans. Any administration of an employee benefit plan is strictly within the control of the employer. Indeed, there is no mechanism within New York's prevailing wage law which would permit the state to regulate the structuring, funding or administration of these plans. The majority in the decision below misinterpreted and overstated the requirements of Labor Law §220. This misinterpretation severely damages the effectiveness of New York's prevailing wage law, and threatens similar laws of many states, including those of the amici states represented herein.

Labor Law §220 and the prevailing wage laws of the amici states herein were originally enacted without a provision for the recognition of employer contributions to employee benefit plans.[2] The undesirable result was an imbalance where those employers who provided valued fringe benefits, such as medical coverage, were penalized for not compensating their employees at a higher cash rate of pay. To correct this imbalance, and to equalize competition among contractors

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[2] With the exception of Pennsylvania, which enacted its prevailing wage law in 1961.

bidding on state projects, states amended their prevailing wage statutes to include provisions for the recognition of the value of certain fringe benefits provided by contractors to their employees.

Indeed, Congress found it necessary to include fringe benefits in the determination of the prevailing wage by amending the federal prevailing wage statute, 40 U.S.C. Section 276a, et seq. (Davis-Bacon Act)[3] :

> The amendments to the Davis-Bacon Act proposed by H.R. 6041 would bring up to date the Davis-Bacon Act by including fringe benefits in prevailing wage determinations. There has been a tremendous change in the concept of earnings since Congress enacted the Davis-Bacon Act. Group hospitalization, disability benefits, and other fringe benefits plans were the rare exception in the 1930's. Today more than 85 million persons in the United States depend upon the benefits they provide. Regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation. It has become increasingly apparent that if the Davis-Bacon Act is to continue to accomplish its purpose, prevailing wage determinations issued pursuant to the act must be enlarged to include fringe benefits. The act was founded on the sound principle of public policy that the Federal Government should not be a party to the destruction of prevailing wage practices and customs in a locality. Unless the law is amended to provide for the inclusion of fringe benefits in wage determinations, prevailing wage practices and customs will not be reflected in these determinations.

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[3] Public Law 88-349, Section 1 amended 40 U.S.C. 276a by adding a new subsection (b).

H.R. Rep. No. 308, *Amendments to the Davis-Bacon Act*, 88th Cong., 1st Sess., 2-3 (1963).

The State of New York and the amici states have a strong interest in the continued recognition of an employer's contribution to an employee benefit plan. If the State of New York or any other state with a prevailing wage law is no longer empowered to recognize the value of these contributions, an imbalance in the competitive bidding process would reappear. Those employers who would continue to provide benefits to employees would be at a competitive disadvantage in the bidding process.

Under Labor Law §220, the value of the employer's contribution to an employee benefit plan is credited toward the total compensation received by the employee while employed on a public project. The total compensation package received by the employee must be at least equivalent to the prevailing rate of wages and the prevailing supplemental rate.

Labor Law §220 states, in pertinent part:

> With respect to each supplement determined to be one of the prevailing practices in the locality, the amount of such supplement shall be determined in the following manner. The amount of such supplement shall be the one provided to the majority of workmen, laborers or mechanics in the same trade or occupation. In the event that it be determined that there is not a majority in the same trade or occupation provided with the same amount, then the amount provided to the greater number in such trade or occupation shall be the prevailing practice with respect to the amount of such supplement . . .

Under Labor Law §220, the employer is free to chose the method by which he can discharge his duty to pay the prevailing rate of wages and the supplemental rate. The majority in the decision below, as the dissent accurately

notes, overstated the impact of the supplemental rate requirement when it held that Labor Law §220 prescribed the type, nature and amount of the benefits to be provided by the employer. The fiscal officer annually determines the prevailing wage and supplemental rates: a decision necessary for the preservation of local prevailing wages and customs.[4] It is important to note that the fiscal officer does not control ERISA plans.

Under Labor Law §220, the employer retains total control over employee benefit plans. The employer may choose to provide an equivalent benefit package to the employees on the project, or the employer may choose to provide a full cash payment in lieu of a benefit package. The employer also has the option of providing a combination of both:

> When employees are supplied with the cash equivalent of the cost of obtaining the prevailing benefits or by providing an equivalent benefits plan, or by a combination of benefits and cash equal to the cost of the prevailing benefits.

Action Electrical Contractors Company v. Goldin 64 N.Y. 2d 213, 221-22, (1984) (The New York State Court of Appeals held that an employer is not required to satisfy the supplemental rate obligation by providing in-kind benefit plans.)

The type and amount of the contributions the employer makes, as well as the full administration of the plan, are within the control of the employer. There is nothing in the language of Labor Law §220 which prescribes the terms or conditions of an employee benefit plan freely selected by the employer.

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[4] As noted in Petitioners' Petition for Certiorari, the fiscal officer is the Commissioner of Labor for all public works projects outside of New York City. In New York City, the fiscal officer is the city comptroller. §220(5)(b).

In *Shaw, supra*, this Court found that a New York state law mandating certain disability benefits, which was not otherwise preempted by ERISA, did not become preempted by ERISA simply because the state law permitted ERISA plans to provide the mandated benefit. The mandate of a prevailing wage by New York will not, in and of itself, be preempted by ERISA. See, *Massachusetts v. Morash*, ____ U.S. ____, 109 S.Ct. 1668 (1989)(State law regarding payment of accured vacation time not preempted by ERISA). Based on this Court's analysis in *Shaw, supra*, and *Morash, supra*, the fact that New York's prevailing wage law permits public work contractors to offset their wage requirements with the contractors' costs of providing certain ERISA-covered benefits does not cause ERISA to preempt New York's prevailing wage law.

In *Aetna Life Insurance Company v. Borges*, 869 F.2d 142, (2nd Cir. 1989), the Second Circuit Court of Appeals reviewed a Connecticut escheat law requiring that drafts for employee benefits which remained uncollected for three years or more revert to the state treasurer. The court noted that although the escheat law impacted on employee benefit plans, the effect on the plans was too tenuous and remote to warrant ERISA preemption. The court stated:

> What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit.

Id. at 146-147 (2nd Cir. 1989).

In *Rebaldo v. Cuomo*, 749 F.2d 133 (2nd Cir. 1984), the Second Circuit Court of Appeals held that state regulation of hospital costs and rates are not preempted by ERISA even though the regulation increases the costs of maintaining employee benefit plans. The court wisely recognized that ERISA does not preempt every state law that incidentally touches upon an employee benefit plan. In the instant case,

the majority in the Court of Appeals rejected its own wisdom by extending ERISA preemption to state laws which only incidentally touch upon employee benefit plans. If permitted to stand, this result will have damaging consequences to a variety of state laws in many different areas of state regulation.

The majority in the decision below, in reasoning that Labor Law §220 is preempted by ERISA, mistakenly relies upon inapposite case authority which preempted state laws *requiring* employee benefit contributions. The state laws examined in *Local Union 598, Plumbers and Pipefitters Industry Journeymen and Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213 (9th Cir. 1988), and *Stone v. Webster Engineering Corporation*, 690 F.2d 323 (2nd Cir. 1982), were in complete contrast to Labor Law §220 and the prevailing wage laws of the amici states. The majority in the decision below failed to acknowledge that there is no provision in Labor Law §220 requiring an employer's contribution to any particular employee benefit plan. The dissent correctly notes that the majority "breaks stride" with the previous decisions of the court in the area of ERISA preemption. The dissent properly states that *Aetna Life, supra*, and *Rebaldo, supra*, should be followed as they discuss state statutes which are more similar to the prevailing wage law in issue here. 891 F.2d 25, 31 (2nd Cir. 1989).

If the negligible effect of Labor Law §220 on the administrative procedures of maintaining an employee benefit plan, freely chosen and administered by the employer, is sufficient to preempt New York's prevailing wage law, then certainly many other state laws will be called into question. In *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984), the court, in reviewing whether ERISA preempts state regulations which merely increase the costs of maintaining employee benefit plans, held:

> That argument [that the state regulation is preempted] does not withstand scrutiny. So too, for example, do state laws and municipal ordinances regulating zoning, health, and safety

> increase the operational costs of ERISA trusts, but no one could seriously argue that they are preempted.

Id. at 1340. *See also Rebaldo, supra*, p. 138-139 ("[I]f ERISA is held to invalidate every state statute which affects the operation of employee benefit plans, those plans will be permitted a charmed existence that was never contemplated by Congress."); and *American Progressive Life & Health Insurance Co. v. Corcoran*, 715 F.2d 784, 787 (2nd Cir. 1983) (Court refuses to preempt state regulation of employee benefit plans where only the administrative costs of the plans were affected).

The majority in the Court of Appeals extends the preemption provision far beyond what Congress intended when it enacted ERISA. As the court in *Aetna Life Insurance, supra*, observed:

> Congress, . . . could not possibly have meant to preempt all laws having any impact on such plans, no matter how small or how tangential.

Aetna Life Insurance Co., supra, at 145.

It is also unlikely that Congress intended to preempt all state prevailing wage laws while preserving federal laws of the same character with respect to plans covered by ERISA. ERISA Section 514(d) provides that "[n]othing in this title [including the ERISA preemption provision] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States or any rule or regulation issued under any such law."[5] In the context of federal public contracts, the Davis-Bacon Act imposes prevailing wage requirements which, like the New York State requirements, set wage requirements based upon local

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[5] Except as provided in sections 111 [concerning the repeal of the Welfare and Pension Plans Disclosure Act] and 507(b) [concerning authorization for Department of Labor personnel].

considerations.[6]

In light of ERISA Section 514(d) and the Davis-Bacon Act, contributions to ERISA-covered employee benefit plans made by an employer in connection with federal prevailing wage requirements are not affected by ERISA. Indeed, the Court has recognized that, on its face, the Davis-Bacon Act is no more than a federal prevailing wage law designed for the benefit of workers on federal construction projects. *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 772 (1981); *United States v. Binghamton Construction Co.*, 347 U.S. 171, 178, *reh'q denied* 347 U.S. 940 (1954). Congress has indicated no intent to have ERISA preempt long-standing state prevailing wage laws, while leaving federal prevailing wage laws intact. Such a result would severely disrupt "the separate spheres of governmental authority" as to minimum wage laws and would have "far-reaching consequences" of the sort contemplated by the Court in *Morash, supra*.

The majority decision in the Court of Appeals threatens many state laws which Congress could not possibly have intended when it enacted ERISA. The effects of the majority decision will reach far beyond the prevailing wage laws of the State of New York and of the amici states represented herein. Certiorari should be granted in this case so that these troubling, far-reaching effects of the majority's decision are reviewed and ultimately avoided.

II. THE COURT OF APPEALS' ERRONEOUS INTERPRETATION OF SECTION 514 OF ERISA NULLIFIES THE EXERCISE OF THE TRADITIONAL POLICE POWERS OF THE STATE OF NEW YORK AND THREATENS THE EXERCISE OF THE TRADITIONAL POLICE POWERS OF MANY OTHER STATES.

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[6] It should be noted that the Davis-Bacon Act applies to public work projects involving the District of Columbia.

A. The Court of Appeals Misinterpreted Section 514 of ERISA.

The majority in the decision below incorrectly interpreted the provisions of Section 514 of ERISA (Section 514) when it held that Labor Law §220 is preempted by ERISA because it "relates to" ERISA covered employee benefit plans.

Section 514(a) provides, in part:

> [T]he provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

Section 514(c)(2) defines the term "State", as it appears in 514(a), to include:

> a state, any political subdivisions thereof or any agency or instrumentality of either which purports *to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.* (Emphasis added.)

In order to interpret the term "relate to," as it applies in Section 514(a), it is crucial to examine the term "State," as defined in Section 514(c)(2). Section 514, when read in full, clearly provides that a state law is not preempted unless it *regulates*, directly or indirectly, an employee benefit plan covered under ERISA. Since Labor Law §220 does not purport to regulate the terms or conditions of ERISA-covered employee benefits plans, directly or indirectly, Labor Law §220 cannot relate to employee benefit plans within the meaning of ERISA.

This Court's reasoning in *Shaw, supra*, illustrates that the majority decision was incorrect. This Court recognized the distinction between those state laws which truly "relate to" employee benefit plans and those state laws which have a purpose unrelated to employee benefit plans and which "affect employee benefit plans in too tenuous, remote or

peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100 n.21 (1988). This Court's holding in *Shaw, supra,* acknowledges that a state law which regulates an ERISA benefit plan, directly or indirectly, is preempted by ERISA, whereas those laws with an unrelated state purpose and which only remotely affect ERISA covered plans do not "relate" in the sense that they are preempted by ERISA. *Id. See also Rebaldo, supra,* p. 147.

The majority in the Court of Appeals interprets Section 514 in a manner which obscures the purpose of ERISA, and the intent of Congress. As stated in *Rebaldo, supra:*

> ERISA does not invalidate those State statutes whose effect on pension plans is simply tangential in nature. This conclusion follows as a matter of common sense from the fact that ERISA plan members and managers are bound to engage in myriad transactions that Congress never considered when it drafted §514. A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction.

Id. p. 138. *See also Aetna Life, supra,* p. 145.

B. The Decision of the Court of Appeals Nullifies the Power of the State of New York to Address a Legitimate Local Need.

The majority in the Court of Appeals below misinterpreted Section 514(a) when it held that ERISA "sought to preempt all state laws that relate to an employee benefit plan and not just state laws which purport to regulate an area expressly covered by ERISA". 891 F.2d 25, 29 (2nd Cir. 1989) The majority ignores Section 514(c)(2) and reads Section 514(a) in isolation. Such a reading will broadly sweep away many of the states' traditional police powers which Section 514(c)(2) was undoubtedly designed to protect.

The purpose of each prevailing wage law is to respond to legitimate, purely local needs. One such need involves the state's concern with the employment of its local citizens. The prevailing wage rate set by state statute deters out of state contractors from successfully bidding on state projects and subsequently employing out-of-state employees at a rate of pay lower than the wages prevailing in the locality of the project. It was Congress' intent to leave to the states the authority to promulgate regulations which serve the state's local economic needs. *Morash, supra.* Preemption of Labor Law §220 would infringe upon the State of New York's ability to respond to this legitimate local need.

The exercise of a state's police powers should not be superseded by federal regulations unless that was the clear intent of Congress. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). *See also Rebaldo, supra.* State regulation of labor standards on public work projects is within the traditional police powers exercised by the state. *Fort Halifax Packing Co. Inc. v. Coyne*, 482 U.S. 1 (1987). States possess broad authority under their police powers to regulate the employment relationship with the state. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). Examples of this authority include minimum and other wage laws. *Id. See also Decanas v. Bica*, 424 U.S. 351 (1976). It is clear that New York's prevailing wage law is a valid exercise of the state's traditional police power.

It is clear that Labor Law §220 does not "relate to" employee benefit plans within the meaning of ERISA. The majority in the decision below infringes upon the exercise of New York's traditional police powers and has the potential of causing a similar infringement upon the police powers of the amici states represented herein. Absent a clear expression of intent from Congress, ERISA cannot be construed to preempt wage collection statutes which have only a remote and tenuous connection to employee benefit plans, because these state statutes represent a fundamental exercise of the state's police power. *Morash, supra. See also Gilbert v. Burlington Industries, Inc.* 765 F.2d 320 (2nd Cir. 1985). The dissent in the court below correctly stated that

a state law governing labor costs was not the type of statute that Congress intended to preempt.

The goal of Congress in enacting ERISA was to ensure the uniformity of employee benefit plans so "that employers would not face conflicting or inconsistent state and local regulation of employee benefit plans." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Neither Labor Law §220, nor the prevailing wage laws of the amici states, do any harm to this goal. Labor Law §220 and the prevailing wage laws threatened by the decision of the Court of Appeals, do not regulate, directly or indirectly, ERISA-covered employee benefit plans.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR, THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,
Petitioners,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, IN SUPPORT OF THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1590

NEW YORK STATE DEPARTMENT OF LABOR, THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the Building and Construction Trades Department, AFL-CIO, respectfully moves for leave to file the accompanying brief *amicus curiae* urging review of the decision below. Petitioners have consented to the filing of this brief; respondent has not.

INTEREST OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT

The Building and Construction Trades Department, AFL-CIO, is an unincorporated labor organization composed of fifteen national and international building and construction trades unions representing nearly four million laborers and mechanics employed in the construction industry.* Many of these workers are employed on projects to construct public buildings and public works financed in whole, or in part, by state monies.

Many states have adopted laws which require contractors and subcontractors on such projects to pay their laborers and mechanics not less than the dollar value of wages and fringe benefits determined to be prevailing in the locality where the state-funded public building or public work is constructed.

Under New York's prevailing wage laws, employers on public works projects are not required to make contributions to fringe benefit plans; they are not required to establish fringe benefit plans; they are not even re-

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* The fifteen constituent unions are:

International Association of Heat and Frost Insulators and Asbestos Workers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Union of Bricklayers and Allied Craftsmen; United Brotherhood of Carpenters and Joiners of America; International Brotherhood of Electrical Workers; International Union of Elevator Constructors; International Association of Bridge, Structural and Ornamental Iron Workers; Laborers' International Union of North America; International Union of Operating Engineers; Operative Plasterers' and Cement Masons' International Association of the United States and Canada; International Brotherhood of Painters and Allied Trades; United Union of Roofers, Waterproofers and Allied Workers; Sheet Metal Workers' International Union; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

quired to provide fringe benefits. Rather, employers are required to provide their employees with the dollar value of the wage and fringe benefit supplements prevailing in the jurisdiction of the public works project. This requirement can be satisfied through either cash wages alone or a combination of cash wages and fringe benefit payments.

The purposes of state prevailing wage laws are: (1) to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area and, (2) to equalize competition among all contractors in bidding on state-funded construction contracts by equalizing labor costs. As such, state prevailing wage laws are designed for the benefit of the construction workers who are represented by the Building and Construction Trades Department, AFL-CIO, and its affiliated national and international unions.

The Building and Construction Trades Department, AFL-CIO, is keenly interested in any judicial decision which undermines the protections afforded by state prevailing wage laws. The holding of the court below establishes a precedent which, unless reviewed, will place in question the ability of the State of New York, and nearly every other state that includes the dollar value of fringe benefits in its determination of the "prevailing wages," to administer and enforce its prevailing wage law.

FACTS AND QUESTIONS OF LAW DEVELOPED BY THE BCTD

The Building and Construction Trades Department's brief focuses on issues which it believes may not be presented elsewhere, including:

(a) The particularly adverse impact that the holding below will have on construction workers represented by the Department; and

(b) The fundamental conflict between the decision below and the decisions of this Court and prior decisions of the Second Circuit, with respect to ERISA preemption and the Tenth Amendment to the United States Constitution.

The Building and Construction Trades Department, therefore, moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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Dated: May 10, 1990

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT	2
SUMMARY OF REASONS FOR REVIEW	2
REASONS FOR REVIEW	3
CONCLUSION	11

TABLE OF AUTHORITIES

CASES: Page

Action Electrical Contractors Co. v. Goldin, 485 N.Y.S.2d 241 (1984) 6, 9
AEtna Life Insurance Co. v. Borges, 869 F.2d 142 (2d Cir. 1989) 9
Alessi v. Raybestos-Manhattan, 451 U.S. 504 (1981) 4
Brang Co. v. State University Const. Fund, 365 N.Y.S.2d 914 (1975) 4
Calder v. Bull, 3 U.S. (3 Dall.) 388 (1798) 5
Campbell v. City of New York, 244 N.Y. 317 (1927) 4
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 5, 7
Hewlitt-Packard Co. v. Barnes, 571 F.2d 502 (9th Cir. 1978) 5
Massachusetts v. Morash, 490 U.S. ——, 104 L.Ed.2d 98 (1989) 8
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 4, 8
Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1984) 9
Schultz v. Nat. Coalition of Hispanic M.H.H.S. Org., 678 F. Supp. 936 (D.D.C. 1988) 5
Shaw v. Delta Air Lines, 463 U.S. 85 (1983) 9
Silverman v. Browning, 414 F. Supp. 80 (D. Conn. 1976) 5
Texas v. White, 74 U.S. (7 Wall.) 700 (1869) 7
Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976) 4
United States v. American Trucking Ass'ns., 310 U.S. 534 (1940) 5
Universities Research Assoc. v. Coutu, 450 U.S. 754 (1981) 8

STATUTES:

29 U.S.C. §§ 1021-31 10
29 U.S.C. §§ 1051-86 10
29 U.S.C. §§ 1104-14 10
Davis-Bacon Act, 40 U.S.C. § 276a, *et seq.* (1986) 8

TABLE OF AUTHORITIES—Continued

Page

New York Labor Law Section 220 (McKinney 1986) ..... *passim*

LEGISLATIVE MATERIALS:

S. Rep. No. 963, 88th Cong., 2d Sess. (1964) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1590

NEW YORK STATE DEPARTMENT OF LABOR, THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,
Petitioners,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, IN SUPPORT OF THE PETITIONERS

The Building and Construction Trades Department, AFL-CIO, (the "Department") submits this brief *amicus curiae* to urge the Court to review the decision below that ERISA preempts a New York prevailing wage law that does not require an employer to establish, maintain,

or modify an employee benefit plan, or even to pay fringe benefits to its employees.

INTEREST OF THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT

The nature and purpose of the Department are set forth in the accompanying Motion for leave to file this brief. As set forth herein, the Department submits that the decision below will have a significant adverse effect upon construction workers for whose benefit state prevailing wages laws have been enacted. The result of the decision below is the effective nullification of New York's entire prevailing wage law. The decision portends a similar negative impact on the prevailing wage laws of over 30 other states that consider the value of fringe benefits in their wage calculations.

SUMMARY OF REASONS FOR REVIEW

States have traditionally determined the prevailing wages that are paid on state-funded public works projects. New York Labor Law Section 220 (McKinney 1986) is such a prevailing wage law, which includes the value of cash wages and fringe benefits prevailing in the applicable jurisdiction. The highest court in New York has interpreted Section 220 and held that its requirements can be satisfied with cash wages, and that it does not require an employer to provide fringe benefits. The court below has reinterpreted New York law, seemingly without regard to the Tenth Amendment, and held it preempted under ERISA. In so holding, the court ignored its own decisional law and misinterpreted the decisions of this Court. The decision below jeopardizes the long-standing policy of New York and a majority of the states to provide a minimum level of compensation on public works projects.

REASONS FOR REVIEW

Fringe benefit contributions constitute an increasing percentage of the total compensation package offered to employees. In the Rochester, New York area, for example, fringe benefits (known as "supplements") constitute 15 to 30 percent of the value of the total compensation package for employees in the construction trades.[1]

If contractors from outside a particular locality are not required to pay the value of the prevailing rate of wages —including the value of supplements—the overall labor

[1] For employees represented by the Rochester, New York Building and Construction Trades Council, AFL-CIO, the following lists the total dollar value of the supplements provided under their collective bargaining agrements, and the percentage of the total compensation package which those supplements represent:

Union	Total Dollar Value of Supplements	Percentage of Total Wage Package
Asbestos Removers Local 202	3.20	16.5
Asbestos Workers Local 26	6.09	24.2
Boilermakers Lodge 7	7.20	28.0
Bricklayers Local 11	7.80	31.0
Carpenters Local 85	6.19	31.0
Cement Finishers Local 11	7.80	31.0
Electrical Workers Local 86	5.05	20.2
Elevator Constr. Local 27	7.695	28.3
Floor Layers Local 732	5.395	25.6
Glaziers Local 677	4.63	21.6
Iron Workers Local 33	6.80	27.1
Laborers Local 435	5.41	28.4
Lathers Local 85	6.26	26.1
Millwrights Local 1163	7.10	28.4
Operating Eng. Local 832	7.125	28.4
Painters Local 150	5.52	24.0
Plumbers Local 13	6.22	23.9
Roofers Local 22	3.28	15.0
Sheet Metal Workers Local 46	7.26	28.2
Teamsters Local 398	2.90	14.5
Technical Eng. Local 545D	6.35	26.8
Tile & Marble Mech. Local 11	6.31	25.0

costs for those contractors will be significantly lower than the labor costs prevailing for local contractors. The result will be to place those local contractors, which are contractually required to provide fringe benefits to their workers, at a competitive disadvantage in bidding on public works projects. This is exactly what the legislature sought to prevent when it amended the New York prevailing wage statute to include the value of supplements in the calculation of the value of the prevailing wage.

The effect of the decision below is to allow nonlocal and nonunion contractors to pay their employees a total compensation package substantially lower in value than the prevailing rate, in contravention to the state's longstanding policy "to insure that workmen on public projects will receive an adequate wage," and to afford "protection to a contractor by giving him some foreknowledge of potential labor costs when bidding on such projects." *Brang Co. v. State University Const. Fund*, 365 N.Y.S.2d 914 (1975). *See Campbell v. City of New York*, 244 N.Y. 317 (1927).

Judicial analysis of ERISA's preemption provision, 29 U.S.C. § 1114, begins with the presumption that state laws are not preempted by federal statute in the absence of persuasive evidence to the contrary. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741 (1985); *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 522 (1981). Having concluded that ERISA's preemption provision is "not a model of legislative drafting," *Metropolitan Life*, 471 U.S. at 739, this Court consistently turns to the legislative history of ERISA for guidance.[2]

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[2] The Court has on numerous occasions expressed its general dissatisfaction with any "plain meaning" rule: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976)

Most recently, the Court has highlighted that ERISA preemption reflects Congressional "concern about the effect of state regulation on the administration of benefit programs," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987). "The focus of the statute thus is on the administrative integrity of benefit plans. . . ." *Fort Halifax*, 482 U.S. at 15. The Court held that ERISA does not preempt a state statute that "creates no impediment to an employer's adoption of a uniform benefit administrative scheme * * * [or that] presents no risk either that an employer will evade or that a state will dislodge otherwise applicable federal regulatory requirements," *Fort Halifax*, 482 U.S. at 14-17. Thus, "the cases stressing the broad reach of the ERISA preemption clause also stress that common sense should not be left at the courthouse door." *Schultz v. Nat. Coalition of Hispanic M.H.H.S. Org.*, 678 F. Supp. 936, 938 (D.D.C. 1988).

The preemption of state law under ERISA is a valid exercise of Congress' power under the Commerce Clause[3] and does not violate the Tenth Amendment to the Constitution. However, the necessary predicate to determining whether ERISA preempts a state law is a determination of the meaning of the state law. And, the interpretation of state law has long been recognized as being committed to the states under the Tenth Amendment. *See Calder v. Bull*, 3 U.S. (3 Dall.) 388 (1798). "Absent proof of prejudice or abuse of discretion, the state courts must be presumed to act in good faith and with judicial wisdom. . . ." *Silverman v. Browning*, 414 F. Supp. 80, 88 (D. Conn.), *aff'd*, 429 U.S. 876 (1976). Notwithstanding the foregoing, in the instant case, the Second Circuit has seemingly rejected the interpretation

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quoting United States v. American Trucking Ass'ns., 310 U.S. 534, 543-44 (1940).

[3] *See, e.g., Hewlitt-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

of New York law by the highest court in New York[4] and has held that its own Second Circuit reinterpretation of New York law is preempted by ERISA.

In *Action Electrical*, the highest court in New York interpreted New York Labor Law Section 220 and held that Section 220's "requirement will be fulfilled when employees are supplied with the cash equivalent of the cost of obtaining the prevailing benefits *or* by providing an equivalent benefit plan, *or* by a combination of benefits and cash," 485 N.Y.S.2d at 242 (emphasis supplied). To deny that the New York State law permits an employer to satisfy its obligation totally by payments in cash without resort to payments from any benefit plan, is "an arbitrary and irrational interpretation of the statute," *Action Electrical*, 485 N.Y.S.2d at 245.

Notwithstanding the New York judicial interpretation of New York law to permit an employer to satisfy the prevailing wage without resort to establishing, maintaining, or modifying any kind of fringe benefit plan, the court below transmogrified the New York law, claiming that Section 220 "prescribes either the type and amount of an employer's contributions to a plan; the rules and regulations under which the plan operates; [and] the nature and amount of the benefits provided thereunder," 891 F.2d at 29 (citations omitted). To reach its conclusion, the court below apparently rejected the plain interpretation of New York law by the highest court in New York.

The New York high court acknowledged that "[s]uperficially, the statute appears clear; an employer must provide supplements. In application, however, the statute's ambiguity becomes obvious. . . ." *Action Electrical*, 485 N.Y.S.2d at 244. The New York court reviewed the legislative history of Section 220, finding "only a concern to

[4] *See Action Electrical Contractors Co. v. Goldin*, 485 N.Y.S.2d 241 (1984).

equalize contractors' minimum labor costs," 485 N.Y.S.2d at 245, rather than any prohibition against an employer paying its employees in cash the total dollar value of the prevailing wage package.

Rather than deferring to the State's interpretation of its own statute, the Second Circuit assumed the role of interpreter of New York law. In so doing, the Second Circuit blinked past the Tenth Amendment and the established principles that "the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

Recently, this Court stressed that "ERISA preemption analysis 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.' If a state creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local social and economic problems." *Fort Halifax*, 482 U.S. at 19 (citations omitted). In *Fort Halifax*, this Court saved from ERISA preemption a state statute, because it "neither establishe[d], nor require[d] an employer to maintain" an employee benefit plan. *Id.*, 482 U.S. at 6. The "focus of [ERISA] is on the administrative integrity of benefit plans." *Id.*, 482 U.S. at 15. And, "[p]reemption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations." *Id.*, 482 U.S. at 11.

The court below held Section 220 preempted, even though New York's highest court holds that an employer can satisfy Section 220 without establishing, maintaining, or in any way involving itself or its employees with a fringe benefit plan. Section 220 is nothing more than a

minimum wage law.[5] "The States have traditionally regulated the payment of wages. . . . Absent any indications that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere. . . ." *Massachusetts v. Morash*, 490 U.S. ——, 104 L.Ed.2d 98, 111 (1989). Furthermore, the courts "must presume that Congress did not intend to preempt areas of traditional state regulations." *Metropolitan Life*, 471 U.S. at 740.

Given that ERISA's preemption provision is "not a model of legislative drafting," *Metropolitan Life*, 471 U.S. at 739, this Court has emphasized the use of "common sense" in construing and applying that provision, *id.* Similarly, this Court acknowledges that some state laws are saved from ERISA preemption, because they "may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant such a finding," *Shaw v. Delta Air Lines*, 463 U.S. 85, 100 n.21 (1983).

The New York prevailing wage law, like the Massachusetts vacation law in *Morash* and the Maine severance pay law in *Fort Halifax*, does not require that an employer make specific contributions to or in any way participate in any employee benefit plan. Furthermore, New

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[5] Section 220 is New York's state-level version of the Davis-Bacon Act, 40 U.S.C. § 276a, *et seq.*, which this Court has held to be a minimum wage law, designed for the benefit of construction workers. *Universities Research Assoc. v. Coutu*, 450 U.S. 754, 772 (1981). The Davis-Bacon Act was amended in 1964 to require that the calculation of prevailing wage include the value of fringe benefits prevailing in the applicable jurisdiction. As with Section 220, the Davis-Bacon Act ensures that an employer can provide the prevailing wage rate without actually establishing or providing fringe benefits. The employer is entitled to satisfy the Act by "making payments in cash" directly to the employee. Senate Committee on Labor and Public Welfare, *What H.R. 6041 Does*, S. Rep. No. 963, 88th Cong., 2d Sess. *reprinted in* 1964 *U.S. Code Cong. & Admin. News*, 2339, 2343.

York's prevailing wage law does not attempt to regulate the administration of any employee benefit plan. Consequently, the New York prevailing wage law does not present any of the risks that ERISA preemption was intended to address, and under *Morash* and *Fort Halifax* should not be preempted.

This conclusion is not altered by the fact that the New York law gives employers the options of meeting the statutory requirement by providing "a combination of cash and benefits, or by an equivalent benefit plan" in addition to allowing cash payments directly to employees. *Action Electrical*, 485 N.Y.S.2d at 242. As stated, by Judge Pratt in his dissenting opinion below:

> The fact that employers may choose to comply with the law by providing a different benefit plan or a combination of benefits and cash rather than by simply paying the additional costs as wages, does not render the statute preempted.

891 F.2d at 30 (Pratt, J. dissenting), *citing Shaw v. Delta Air Lines, Inc.*, 263 U.S. 85 (1983). To hold otherwise would yield the truly absurd result that an otherwise valid requirement that a public works contractor pay certain monies directly to his employees would be held preempted, because the state law gave the contractors more options, instead of fewer.

In *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), the Second Circuit held that a New York law regulating hospital rates was not preempted under ERISA. In so holding, the Second Circuit "analogized to State labor laws that govern working conditions and labor costs," *id.* 749 F.2d at 138, to conclude that a state statute is not preempted that "does not affect the structure, the administration, or the type of benefits provided by an ERISA plan. . . ." *Id.*, 749 F.2d at 139. Then, in *AEtna Life Insurance Co. v. Borges*, 869 F.2d 142, 145 (2d Cir. 1989), the Second Circuit reiterated the point:

> As we noted in *Rebaldo*, many state laws affect the cost and administration of pension plans: labor laws that govern working conditions and labor costs, rent control laws that determine what employee benefit plans pay or receive for rental property, and even highway and bridge tolls charged to plans' officers or employees. "[I]f ERISA is held to invalidate every state action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress."

As Judge Pratt noted in his dissenting opinion in the instant case,

> The Majority [did] not attempt to distinguish *Rebaldo* or *AEtna Life* nor . . . could it sensibly do so. New York's prevailing wage statute is a law of general application whose tangential effects on employee benefits plans are negligible and wholly incidental to the law's primary purpose.

891 F.2d at 31 (Pratt, J. dissenting).

ERISA requires that employee benefit plans satisfy certain participation, funding, and vesting requirements, 29 U.S.C. §§ 1051-86; New York's Section 220 touches on none of these. ERISA sets uniform standards for employee benefit plan reporting, disclosure, and fiduciary conduct, 29 U.S.C. §§ 1021-31, 1104-14; New York's Section 220 does not require these of any employee benefit plan. In fact, Section 220 requires nothing to be done by or to employee benefit plans. Nonetheless, the court below invoked ERISA to preempt Section 220.

CONCLUSION

Due to the detrimental effect this decision will have on prevailing wage laws throughout the nation, and because there is no evidence that Congress ever intended to preempt the long-standing policy of New York and more than thirty other states to provide for fair bidding and a minimum level of total compensation on public works projects, the Building and Construction Trades Department urges this Court to review the decision below.

Respectfully submitted,

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Dated: May 10, 1990

* (Counsel of Record)

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MAY 11 1990

No. 89-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR, THOMAS F. HARNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

—against—

GENERAL ELECTRIC COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS' WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1990

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1. Consent to the submission of a brief amicus curiae by the Joint

Industry Board of the Electrical Industry (JIB) having been granted by the Petitioners and refused by the Respondent the JIB hereby moves the Court for leave to file the amicus curiae brief submitted herewith.

2. The JIB is a jointly trusteed organization composed of an equal number of representatives from both management and labor in the electrical industry in New York City. The JIB's purpose is to promote harmony between employers and employees while continuing to improve the quality and safety of the electrical work performed in New York City.

3. The JIB is also the administrator of the numerous

multiemployer employee benefit plans that have been established pursuant to collective bargaining agreements between the New York Electrical Contractors, Inc., the Association of Electrical Contractors, Inc., and Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO.

4. The decision of the Court of Appeals for the Second Circuit, which held that §220 of the New York State Labor Law is preempted by ERISA has a severe detrimental effect to both the employers and the employees in the electrical industry in New York, as well as all employers and employees in the building trades industry.

5. This decision undermines the clearly stated purpose of §220 by expanding the preemption provisions of ERISA to an area of state law that ERISA was not intended to preempt.

6. The JIB believes that the decision of the Court of Appeals for the Second Circuit is incorrect and that such a ruling will have a detrimental effect not only on the electrical industry and the building trades, but also it will have a detrimental effect on the safety of the public at large.

7. By finding that the prevailing wage law of §220 of the New York State Labor Law is invalid, employers will be encouraged to hire less skilled and less

expensive labor which will lead to the reduction of safety on public work projects.

8. Although the Petition sets forth appropriate grounds for the issuance of the writ, it is our belief that the JIB's brief amicus curiae will serve to provide the Court with additional information in support of the issuance of the writ.

Dated: New York, New York
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QUESTIONS PRESENTED

Does ERISA preempt state prevailing wage laws such as New York's Labor Law §220, which requires that contractors employed on public work jobs either provide its employees with the prevailing fringe benefits or pay workers a cash amount equal to the cost of the benefits?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Summary 2

Reason For Granting The Writ 4

I. The Writ of Certiorari Should Be Counter 4

The United States Court of Appeals for the Second Circuit Incorrectly Invalidated New York State's Prevailing Wage Law Contrary to Prior Holdings of The State's Court of Last Resort 4

II. This Case Presents Important Questions of Federal Law Concerning ERISA Preemption Which This Court Should Resolve 5

A. The New York Prevailing Wage and Supplement Statute Is Within the State's Traditional Police Power and Should Not Be Preempted Unless Clearly Intended By Congress 6

B. The New York Prevailing Wage and Supplement Statute Does Not Subject Employers to Conflicting Requirements and Was Not Intended to Be Preempted by ERISA. 7

C. The Prevailing Wage and Supplement Law Affects Employee Benefit Plans in Too Tenuous and Remote a Manner to Warrant Preemption. 17

Conclusion 19

TABLE OF AUTHORITIES

CASES	PAGE
Action Elec. Contr. Co. v. Goldin, 64 N.Y.2d 213,485, N.Y.S.2D 241, 474 N.E.2D 601 (1984)	4, 16
Aetna Life Ins. Co. v. Borges, 869 F. 2d 142 (2d Cir. 1989)	19
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)	11,19
Atkins v. Kansas, 191 U.S. 207 (1903)	7
California Hosp. Assn. v. Henning, 770 F.2d 856 (9th Cir. 1985), cert. denied, 477 U.S. 904 (1986)	9
Fort Halifax Packing Co. Inc. v.Coyne, 482 U.S.1 (1987)	14,18
Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976)	7
Mackey v. Lanier Collection Agency Service Inc., 486 U.S. 825 (1988)	18
Massachusetts v. Morash, __U.S.__, 109 S.Ct. 1668 (1989)	10,13
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)	8

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 9

Pettis Moving Co. Inc. v. Roberts, 784 F.2d 439 (2d Cir. 1986) 6

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 18

Rebaldo v. Cuomo, 749 F. 2d 133 (2d Cir. 1984) 21

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1974) 7

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 8

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 19

White v. Mass. Council of Constr. Employers, 460 U.S. 204 (1983) 6

STATUTES:

Employees Retirement Income Security Act of 1974, 29 U.S.C. A. §1001 et seq (ERISA) §514 3,10

New York State Labor Law §220 5,16,17

MISCELLANEOUS:

120 Cong Record 942 (1974) 10,11

120 Cong Record 4279-80 (1974) 9

IN THE

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OCTOBER TERM, 1989

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-against-

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Respondent.

A BRIEF AMICUS CURIAE ON BEHALF OF THE JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Joint Industry Board of the Electrical Industry (JIB) respectfully submits this amicus curiae brief in support of the petition for a Writ of Certiorari submitted by the Petitioners.

SUMMARY

In the exercise of their traditional police powers, states have set minimum labor standards for individuals employed on public works projects. When a state contracts for labor on public works projects, it performs a proprietary function. This Court has recognized that when a state acts in its proprietary capacity it has broad power to regulate. In the absence of compelling Congressional directive, this power should not be superseded.

The legislative history of ERISA indicates that Congress' primary motivation behind the Act was to prevent mismanagement of accumulated funds and to ensure that employees receive the benefits they are promised.

To meet these goals ERISA

establishes reporting and disclosure requirements and imposes a fiduciary standard of care upon the plan administrators.

Concerned that administration of employee benefit plans would be complicated by conflicting federal and state regulations, Congress enacted §514 of ERISA, 29 U.S.C. §144 to preempt any state laws that "relate to" employee benefit plans. Congress intended primarily to preempt state laws that seek to regulate employee benefit plans and thereby subject employee benefit plans to conflicting requirements. Where state law does not impose conflicting administrative duties, this Court has declined to preempt the state law. A more broad application of §514 is inconsistent with Congressional intent.

New York's prevailing wage and supplement statute affects ERISA plans in too tenuous or remote a manner to warrant preemption.

REASONS FOR GRANTING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED

A. The United States Court of Appeals for the Second Circuit Incorrectly Invalidated New York State's Prevailing Wage Law Contrary to Prior Holdings Of The State's Court Of Last Resort

The New York State Court of Appeals previously passed upon the purpose of §220 of the New York State Labor Law and found it to be a proper state action. In Action Elec. Contr. Co. v. Goldin, 64 N.Y.2d 213, 485 N.Y.S.2d 241, 474 N.E.2d 601 (1984) the Court found that the purpose of the statute is not to require contributions to a benefit plan but

rather to equalize the cost of labor. The Court reviewed §220 of the New York State Labor Law and upheld it so as to allow employers to pay in cash, to the employees, the equivalent of the cost of providing the prevailing supplemental benefits. Therefore, the New York Court of Appeals has interpreted its own state's prevailing wage law as not regulating or interfering with employee benefit plans governed by ERISA.

To the contrary the United States Court of Appeals for the Second Circuit was held in this case that §220 of New York State's Labor Law is preempted by ERISA because it relates to an employee benefit plan which is covered by ERISA.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING ERISA PREEMPTION WHICH THIS COURT SHOULD RESOLVE

The extent to which ERISA preempts state laws which deal with a state's ability to regulate public work jobs is an issue which must be resolved by the United States Supreme Court.

A. THE NEW YORK PREVAILING WAGE AND SUPPLEMENT STATUTE IS WITHIN THE STATE'S TRADITIONAL POLICE POWER AND SHOULD NOT BE PREEMPTED UNLESS CLEARLY INTENDED BY CONGRESS.

States have traditionally, in the exercise of their police powers, regulated minimum labor standards for construction contractors on state projects.[1] A state acts in its proprietary capacity when it contracts for labor on public works projects. White v. Mass. Council of Constr.

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[1] Pettis Moving Co.,Inc., v. Roberts, 784 F.2d 439 (2nd Cir 1986) State law requiring pension pay for hours worked over 40 held to be exercise of traditional state police power.

Employers., 460 U.S. 204 (1983). When a state acts in its proprietary capacity, this Court has recognized that the state has broad authority to set minimum labor standards for those working on the public project. Id. See also Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976), Atkins v. Kansas, 191 U.S. 207 (1903).

Due regard for the presuppositions of federalism requires that the police powers of the state not be superseded by federal act unless that was the clear manifest intent of Congress. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1974). Where the regulated conduct involves local interests traditionally left to state regulation, and the activity regulated is merely a peripheral concern of a federal act, the

Courts should not infer that Congress has deprived the states of the power to act. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-244 (1959).

B. THE NEW YORK PREVAILING WAGE AND SUPPLEMENT STATUTE DOES NOT SUBJECT EMPLOYERS TO CONFLICTING REQUIREMENTS AND WAS NOT INTENDED TO BE PREEMPTED BY ERISA.

In any preemption analysis, "the purpose of Congress is the ultimate touchstone." Metropolitan Life Ins. Co., v. Massachusetts, 471 U.S. 724, 747 (1985). The legislative history indicates that Congress' primary concern in enacting ERISA was to control two major abuses, "mismanagement of funds accumulated to finance ... [employee] benefits, and failure to pay employees the benefits promised" from those

accumulated funds.[2] Through federal act, Congress intended to ensure that if an employee was promised pension benefits upon retirement, and that employee fulfilled the conditions precedent to vesting of the promised benefit, the employee would actually receive those benefits. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980).

To ensure that employee expectations are not defeated, ERISA establishes reporting and disclosure obligations for plans, imposes a fiduciary standard of care for plan administration, and establishes schedules for vesting and accrual of

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[2]California Hosp. Assn. v. Henning., 770 F.2d 856, 859 (9th Cir. 1985), cert. denied 477 U.S. 904 (1986); also see 120 Cong. Rec. 4279-80 (1974) (statement of Rep. Bradenas).

pension benefits. Massachusetts v. Morash., ___U.S.___, 109 S.Ct. 1668, 1671-72 (1989).

Concerned that employers would be subject to a variety of conflicting federal and state regulation, Congress enacted §514, 29 U.S.C. §1144.[3] Senator Willis, floor manager of the bill that was to become ERISA and Chairman of the Committee on Labor and Public Welfare stated that except in limited circumstances, ERISA would "preempt the field for federal regulations thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans." 120 Cong. Rec. 29, 942 (1974).

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[3]Section 514(a) of ERISA preempts "any and all state laws insofar as they may now or hereinafter relate to any employee benefit plan" covered by ERISA.

While the intent to preempt certain areas of state law is clear, the ultimate scope of that preemption is not.[4] Traditionally the role of the Courts is to accommodate rigid statutory language to a myriad of varying factual situations.

Where state law has created the prospect that an employer's administrative scheme would be subject to conflicting requirements, this Court has not hesitated to enforce ERISA's preemption provision. For example, in Alessi v. Raybestos-Manhattan Inc., 451

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[4]Senator Jacob Javits, ranking minority member of the Committee on Labor and Public Welfare suggested that perhaps §514 was an over inclusive starting point for preemption analysis noting that "the desirability of further regulation-at either the State or Federal level-undoubtedly warrants further attention." 120 Cong. Rec. 29, 942 (1974).

U.S. 504 (1981) this Court struck down a New Jersey state statute prohibiting offsetting workers' compensation payments against pension benefits, a practice permitted under federal law. The effect of the statute was to force an employer either to structure its benefits payments in accordance with New Jersey law, or to adopt different payment schedules for in-state and out-of-state employees. The statute's only purpose was to set forth additional statutory requirements for pension plans, a purpose not permitted by Congress. Id at 524.

Where state law does not create the prospects that the employer's administrative scheme will be subject to conflicting regulations, this Court has declined to hold that the law is

preempted.

In Massachusetts v. Morash, __U.S.__, 109 S.Ct. 1668 (1989) this Court was called on to determine whether an employer's policy of paying discharged employees for unused vacation time out of the company's general assets constituted an "employee benefit plan" within the meaning of ERISA. The Court held that although §3 of ERISA defines an "employee welfare benefit plan" as "any plan maintained for the purpose of providing...vacation benefits," when viewed in light of the primary purpose of preventing mismanagement of funds and failure to pay promised benefits it cannot be understood to, or relate to, ordinary vacation benefits which are payable on a regular basis from the general assets of the employer. Id at

1673.

In upholding the Massachusetts law requiring such payments the Court stated that:

> Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside employee's control, they present none of the risks that ERISA intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed--a danger Congress chose not to regulate in ERISA. Id at 1673

In Fort Halifax Packing Co. Inc. v. Coyne, 482 U.S. 1 (1987), a Maine statute required employers to provide a lump sum severance payment to employees laid off in the event of a plant closing. Upholding the statute, the Court said:

> Congress intended preemption

> to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employers obligation. Id at 11.

The Maine statute did not give rise to these types of concerns. It neither established nor required an employer to maintain an employee benefit plan. No administration was necessary for the employer to meet its obligations.

The New York State prevailing wage law requires that laborers, workers and mechanics on public works projects be paid not less than the rate of wages and wage supplements which prevail for workers in the same trade in the

locality of the project.[5] The employer (contractor) meets its statutory obligation when it pays in cash, totally or partially, the cost of prevailing supplemental benefits. Action Elec. Contr. Co., v. Goldin, 64 N.Y. 2d 213, 222, 485 N.Y.S. 2d 241, 245, 474 N.E. 2d 601, 605 (1984). The statute does not require the creation of a fund from which prevailing supplemental benefits will be paid, nor does the statute require that the employer contribute to a benefit plan. As the New York State Court of Appeals has concluded, "this provision should not be interpreted to

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[5]Wage supplements are defined as "all remuneration for employment paid in any median other than cash, or reimbursement for expenses, or any payments which are not 'wages,' including benefits such as health insurance, vacation and holiday pay." N.Y. Labor Law §220(5) (McKinney's 1986)(40a).

require that the employer maintain or contribute directly to a benefit plan equivalent in kind to the prevailing one in order to comply with the statute." Thus the fund management and administration concerns of ERISA are not implicated.

The prevailing wage and wage supplement rates are determined annually by the fiscal officer.[6] The employer is not required to adjust its benefit plan contributions or to make additional calculations to achieve compliance with the law. The payments remain fixed amounts payable directly to the employees with their regular

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[6]The fiscal officer for all public works contracts, other than those on behalf of New York City, is the State Commissioner of Labor. For contracts on behalf of New York City, the City Comptroller acts as the fiscal officer. N.Y. Labor Law §220(5)(6).

compensation from the contractor's general assets. "To do little more than write a check hardly constitutes the operation of a benefit plan." Fort Halifax Packing Co., 482 U.S. 1, 12 (1987).

C. THE PREVAILING WAGE AND SUPPLEMENT LAW AFFECTS EMPLOYEE BENEFIT PLANS IN TOO TENUOUS AND REMOTE A MANNER TO WARRANT PREEMPTION.

Generally, the laws which this Court has ruled preempted, are those that provide an alternative cause of action to employees to collect benefits protected by ERISA or laws that apply specifically to ERISA plans.[7]

[7]State laws or actions that have been preempted include: Common law tort and contract actions asserting improper processing of benefit clause, Pilot Life Ins., Co. v. Dedeaux, 481 U.S. 41 (1987); state law specifically exempting ERISA covered benefits from a generally applicable garnishment law, Mackey v.

Laws that have not been preempted are laws of general application--often traditional exercises of state police power or regulatory authority--whose effect on ERISA plans are incidental to the law's primary objectives. Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2nd Cir. 1989). Some state laws may "affect employee benefit plans in too tenuous, remote or peripheral a manner" to warrant preemption. Shaw v. Delta Air Lines Inc., 463 U.S. 85, (1982).

Based upon these cases, it appears

Lanier Collection Agency Service Inc., 486 U.S. 825 (1988); state law prohibiting discrimination in benefit progress on the basis of pregnancy, Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); and state law prohibiting method of benefit calculation permitted by ERISA, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). See generally Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2nd Cir. 1989). cert denied 110 S.Ct. 57 (1989).

that what "triggers preemption is not just any indirect effect or administrative procedures, but rather an effect on the primary administrative functions of benefits plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." 869 F.2d 142 at 146-47.

New York's prevailing wage law does not effect a benefit plan's administrative procedures, does not effect benefit eligibility and does not regulate the amount of a benefit paid by a plan. It merely seeks to equalize labor costs for employers bidding on public works contracts. Any administrative constraints that this law places on plan administrators is merely incidental.

New York's prevailing wage law may

make an employer's benefit plan more expensive to operate, but the mere fact that the statute has some economic impact on a plan does not require that the statute be invalidated. In Rebaldo v. Cuomo, 749 F.2d 133 (2nd Cir. 1984) the Court held:

> If ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress. Where, as here, a State statue of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated. Id at 138-139.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
May 9, 1990

Respectfully submitted,

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No. 89-1590

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IN THE

Supreme Court of the United States

October Term, 1989

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

against

GENERAL ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

CASES	PAGE
Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 477 U.S. 901 (1986)	1, 2, 3
Hicks v. Miranda, 422 U.S. 332 (1975)	3
Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co., 846 F.2d 1213 (9th Cir.), *aff'd mem.*, — U.S.—, 109 S.Ct. 210 (1988)	3
Massachusetts v. Morash, — U.S. —, 109 S.Ct. 1668 (1989)	2, 3
STATUTES	
Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1001 et seq. (West 1985 & Supp. 1990)	passim
29 U.S.C.A. § 1002(1) (West Supp. 1990)	3
N.Y. Lab. Law § 198-c (McKinney 1986)	2, 3
N.Y. Lab. Law § 198-c(1) (McKinney 1986)	3
N.Y. Lab. Law § 198-c(2) (McKinney 1986)	2

No. 89-1590

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

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GENERAL ELECTRIC COMPANY,

Respondent.

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PETITIONERS' REPLY BRIEF

Respondent mischaracterizes the holding of the Second Circuit in *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 477 U.S. 901 (1986) in an effort to buttress its claim that the issue presented here has already been decided by this Court in *Gilbert* (Brief of Respondent, p. 9). It claims that, under *Gilbert*, ERISA preempts any law that requires employers to make cash payments, other than pure wages, to employees. Its reading cannot withstand analysis.

The Second Circuit did not hold in *Gilbert* that N.Y. Lab. Law § 198-c (McKinney 1986) is preempted by ERISA.[1] *Gilbert* decided only that § 198-c is preempted to the extent it was applied to require an employer to comply with its agreement to pay severance pay.[2] Therefore, at most, *Gilbert* merely stands for the proposition that a state may not require an employer to pay an ERISA-covered benefit. The case simply may not be interpreted as GE argues to preclude the State from enforcing a law that requires an employer to pay employees on a public work project an amount equal to the cost of prevailing benefits, but does not require provision of the benefits themselves. That is the issue presented in this case.

Moreover, the respondent's interpretation of *Gilbert*, if accepted, would create a direct conflict between that case and this Court's decision in *Massachusetts v. Morash*, — U.S. —, 109 S. Ct. 1668 (1989) where the Court upheld a state law,

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[1] Section 198-c makes it a misdemeanor for an employer to fail to pay workers the "benefits or wage supplements" which it has agreed to pay. N.Y. Lab. Law § 198-c(1). Benefits and wage supplements include "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay." N.Y. Lab. Law § 198-c(2).

[2] In *Gilbert*, the plaintiffs and the plaintiff-intervenor New York State Commissioner of Labor argued that a promise by an employer to pay severance pay out of general assets was not an ERISA plan. The Second Circuit disagreed because ERISA was intended to cover benefit payments which involve a risk beyond that of ordinary wage payment.

> "[A]n employer faced with the loss of many employees may owe a large amount in severance pay, increasing the risk that it might default on its severance pay obligations because of a lack of funds. This financial loss to employees is a primary concern of ERISA."

Gilbert v. Burlington Industries, Inc. 765 F.2d at 326. (citation omitted.)

virtually identical to N.Y. Lab. Law § 198-c, which requires employers to pay accrued vacation pay due to an employee. Although vacation pay, like severance pay, is a benefit listed in ERISA's definition of an employee welfare benefit plan, 29 U.S.C. § 1002(1), the Court held that ERISA did not preempt a state from enforcing an employer policy to pay workers for unused vacation time. Such a policy was held not to be an ERISA plan because ordinary vacation payments "do not depend on contingencies outside the employee's control," [and, therefore,] "present none of the risks that ERISA was intended to address." *Id.* at 1673. *Gilbert*, therefore, may not be read to settle the issue of whether any cash payments (other than severance pay) which are not pure wages constitute an employee benefit plan under ERISA.

GE is also in error in arguing that the issue presented "has been settled by this Court in a way contrary to the position urged by the Department . . .," citing *Local Union 598 Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J. A. Jones Constr. Co.*, 846 F.2d 1213 (9th Cir.), *aff'd mem.*, — U.S. —, 109 S. Ct. 210 (1988). A summary affirmance, while a ruling on the merits, is not to be given precedential effect beyond the precise issue presented and necessarily decided by such actions. *See e.g., Hicks v. Miranda*, 422 U.S. 332 (1975). The issue presented in *Jones*, whether a state may

require a public work contractor to contribute to an ERISA benefit plan, is not present in this case.

Dated: New York, New York
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